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7-11-1

COMMENTARIES
ON
THE LAWS OF ENGLAND.

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IN TWO VOLUMES.

VOL. II.

WITH NOTES BY WILLIAM WAIT.
COUNSELLOR-AT-LAW.

ALBANY, N. Y.
JOHN D. PARSONS, JR., LAW BOOK PUBLISHER.
1875.

Entered, according to act of Congress, in the year eighteen hundred and seventy-five,

By JOHN D. PARSONS, JR.,

In the office of the Librarian of Congress, at Washington.

WEED, PARSONS AND COMPANY,
PRINTERS AND STEREOTYPERS,
ALBANY, N. Y.

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COMMENTARIES

ON THE

LAW OF ENGLAND.

BOOK THE THIRD.

PRIVATE WRONGS.

CHAPTER I.

REDRESS OF PRIVATE WRONGS BY THE ACT OF THE PARTIES.

At the opening of these Commentaries (*a*) municipal law was in general defined to be, “a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, prohibiting what is wrong (*b*), and regulating matters in themselves indifferent.” Hence therefore it followed, that the primary objects of our law are the establishment of rights, and the prohibition of wrongs. And this occasioned the distribution of these collections into two general heads (*c*); under the former of which we have considered the rights that were defined and *established, and under the latter we are now to consider the wrongs, including torts and breaches of contract, that are forbidden, and redressed by the laws of England. [*2]

Wrongs are divisible into two sorts or species; private wrongs, and public wrongs. A private wrong is an infringement or privation of some private or civil right belonging to an individual, and may be termed a civil injury: a public wrong is a breach and violation of some public right and duty, which affects the whole community; and is distinguished by the harsher appellation of a crime. To investigate the first of these species of wrongs, with the remedies appropriate thereto, will be our employment in the

(a) Vol. I. pp. 87, 88.

(b) *Sanctio justa, jubens honesta, et pro-*

hibens contraria; Cic. 11, Philipp. 12; Bract.

l. 1, c. 8.

(c) Vol. i. chap. 1.

present Book; and the other species will be reserved till the next or concluding Volume.

The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited. This remedy is therefore principally to be sought by application to these courts of justice; that is, by civil suit or action. For which reason our chief employment in this Volume will be to consider the redress of private wrongs, by suit or action in court. But as there are certain injuries of such a nature, that some of them furnish and others require a more speedy remedy, than can be had by the ordinary forms of justice, there is allowed in any such case an extrajudicial or eccentric kind of remedy; of which I shall first treat, before considering the several remedies by suit and action: and, to that end, shall distribute the redress of private wrongs into three several species: first, that which is obtained by the mere act of the parties themselves; secondly, that which is effected by the mere act and operation of law; and, thirdly, that which arises from suit, action, or other proceeding in court, and consists in a conjunction of the other two, the act of the parties co-operating with the act of law.

The redress for a private wrong is by parties themselves, by operation of law, or by suit or action.

[* 3] * And, first of that redress of private injuries, which is obtained by the mere act of the parties. This is of two sorts; I. That which arises from the act of the injured party only; and, II. That which arises from the joint act of all the parties together.

Redress by act of the parties.

I. By sole act of party injured. I. Of the former sort, or that which arises from the sole act of the injured party, is,

1. The defence of one's self, or the mutual and reciprocal defence of each other by husband and wife, parent and child, master and servant. (d) (427)

1. Self-defence. For if the party himself, or any one thus related to him, be forcibly attacked in person or property, it is lawful for him to

(d) It is said (*Leward v. Basely*, 1 Ld. Raym. *servitium amisit*. But according to 2 Rol. Abr. 62, and Bul. N. P. 18) that a master cannot 548, D. pl. 2; *Seaman v. Cuppledick*, Owen, justify an assault in defence of his servant, 151; Bac. Abr. Master and Servant, P., such because he might have an action *per quod* an interference by the master is lawful.

(427) A reasonable apprehension of loss of life, or of great and immediate bodily harm, will justify the killing of an assailant, if self-defence appears at the time to be the only mode of escape, although in fact there was no actual danger. *Logue v. The Commonwealth*, 38 Penn. St. 265; *Shorter v. The People*, 2 N. Y. (2 Comst.) 193; *Meredith v. Commonwealth*, 18 B. Monr. (Ky.) 49; *Pond v. People*, 8 Mich. 150; *Maher v. People*, 24 Ill. 241; *State v. Collins*, 32 Iowa, 36; *State v. Sloan*, 47 Mo. 604.

The same circumstances which will excuse or justify homicide in self-defence will excuse or justify it in defence of one's family, relatives, or servants. *Pond v. People*, 8 Mich. 150; *Murphy v. People*, 37 Ill. 447; *People v. Campbell*, 80 Cal. 812. But they will not justify the taking of life in defence of a concubine. *Parker v. State*, 81 Tex. 132.

Where the noise and disturbance of a mob is such as to endanger the life of a person who is sick, the same force may be employed in quelling the riot which would be justifiable if the life of such person were endangered by a direct attack. *Patten v. People*, 18 Mich. 314.

The right to take life in the defence of property is a natural right, as well as in defence of person and habitation; but the law limits its exercise to the prevention of forcible and atrocious crimes. *State v. Moore*, 81 Conn. 479. The destruction of the life of a child in parturition, to save the life of the mother, is justifiable. See 2 Whart. Crim. Law, §§ 1039, 1280.

repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray. (e)

The law, in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or one to whom he bears so near a connexion) makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. The future process of law may be by no means an adequate remedy for an injury accompanied with force; and it is impossible to say, to what wanton lengths of rapine or cruelty an outrage of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence, therefore, as it is justly called the primary law of nature, so is not, neither can it be in fact, taken away by the law of society. In the English law particularly it is sometimes held to furnish an excuse for a breach of the peace, nay even for homicide itself (f); but care must be taken, that the resistance does not *exceed the bounds of mere defence [*4] and prevention; for then the defender would himself become an aggressor. (428)

2. Recaption or reprisal is another species of remedy by the mere act of the party injured. This happens, when any one has deprived another of his property in goods or chattels personal, or wrongfully detains one's

3. Recaption.

wife, child, or servant: in which case the owner of the goods, the husband, parent, or master, may lawfully claim and retake such property or person, wherever found; so it be not in a riotous manner, or attended with a breach of the peace (g). The reason for which is obvious; since the owner may have this only opportunity of doing himself justice: his goods might be afterwards conveyed away or destroyed; and his wife, child, or servant, concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. If therefore where personal property has been forcibly taken its rightful owner can so contrive as to regain possession of it, without violence or terror, the law favours and will justify his proceeding (h). But as the public peace must be considered rather than any one man's right of property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons

(e) 2 Rol. Abr. 546; 1 Hawk. P. C. 488, s. 23.

(f) *Post*, vol. iv.

(g) 8 Inst. 184; Hale, Anal. s. 46. Where goods have been obtained with a preconceived design of not paying for them, the seller may lawfully retake them from the

party who obtained them, for the fraud vitiates the sale, and prevents the property from passing by it, *Earl of Bristol v. Wilmore*, 1 B. & Cr. 514.

(h) *Burridge v. Nicholette*, 6 H. & N. 383; *Smith v. Wright*, Id. 821.

(428) The same rule prevails in this country. The taking of life in self-defence is justifiable only where escape by retreat from immediate and impending danger appears at the time impracticable. *People v. Lamb*, 2 Keyes, 360; *People v. Sullivan*, 7 N. Y. (3 Seld.) 396; *Shorter v. People*, 2 N. Y. (3 Comst.) 193; *Commonwealth v. Drum*, 58 Penn. St. 9. But retreat is not always a condition which must precede the right to self-defence. *Creek v. State*, 24 Ind. 154; *Phillips v. Commonwealth*, 2 Duvall (Ky.), 328; and see *Bohannon v. Commonwealth*, 8 Bush (Ky.), 481; 8 Am. Rep. 474. A person assaulted in his own dwelling may lawfully resist the assault, even to the taking of life if necessary, without attempting to retreat. *M'Pherson v. State*, 22 Ga. 478; *Pond v. People*, 8 Mich. 150. Or if a person is prevented from entering his own house by an intruder, he may lawfully use such force as may be necessary to effect an entrance. *DeForest v. State*, 21 Ind. 23.

it is provided, that this natural right of recaption shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him [* 5] on a common, at a fair, or at a public inn, I may lawfully seize * him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen (i); but must have recourse to an action at law. (429)

3. As recaption is a remedy given to the party himself, for an injury to his personal property, so, a remedy of the same kind for an injury to real property is sometimes permitted by entry on lands and tenements, ^{s. Re-entry on land.} when another person without any right has taken or retains possession thereof. (430) This depends in some measure on like reasons with the former; and like that too must be peaceable and without force or violence which might endanger the public peace. There is some nicety required in defining and distinguishing circumstances in which such entry might be lawful or otherwise; and especially in determining whether notice should be given before re-entry and eviction to the person who is wrongfully in possession (k).

4. A fourth species of remedy by the mere act of the party injured, is the abatement, or removal of a nuisance. (431) What a nuisance is, we shall find

(i) 2 Roll. Rep. 55, 56, 208; 2 Roll. Abr. *Harvey v. Bridges*, 1 Exch. 261; 14 M. & W. 565, 568.

(k) *Newton v. Harland*, 1 M. & Gr. 644;

(429) The law permits a party to resort to every possible means for the recaption of his property, short of a breach of the peace. *Spencer v. M'Gowen*, 13 Wend. 256; *Hyatt v. Wood*, 4 Johns. 150; *Kenny v. Planer*, 3 Daly (N. Y.), 181. But it does not permit him to enter upon the premises of a third person, who is not a wrong-doer, for that purpose, without first obtaining the owner's permission (*Blake v. Jerome*, 14 Johns. 406; *Newkirk v. Sabler*, 9 Barb. 652); and his attempt to do so may be forcibly resisted. Ib.

(430) The statutes of the various States respecting forcible entries and detainers do not affect the right of the owner of real estate, having a right of entry, to enter peaceably upon one who is in possession without right. *Hyatt v. Wood*, 4 Johns. 150; *People v. Fields*, 1 Lans. 222; *Commonwealth v. Rees*, 2 Brewst. (Pa.) 564; *Winterfield v. Stauss*, 24 Wis. 394; *Foster v. Kelsey*, 36 Vt. 199; *Tucker v. Phillips*, 2 Metc. (Ky.) 416.

One tenant in common has a right to take peaceable possession of the premises owned in common, even though the possession is acquired by stealth. *Wood v. Phillips*, 48 N. Y. (4 Hand) 152. And in the absence of the occupant no one being left in possession, the party having the legal right to possession may enter upon the premises, although he is obliged to force a door in order to do so. *Mussey v. Scott*, 32 Vt. 82; *State v. Pridgen*, 8 Ired. 84.

(431) Whenever a person can maintain an action for a nuisance he may enter and abate it, even though, at the time, it caused but nominal damage. *Amoskeag Manufacturing Co. v. Goodule*, 46 N. H. 53; *Adams v. Barney*, 25 Vt. 225; *Casebeer v. Mowry*, 55 Penn. St. 419.

But if he takes the remedy into his own hands he must proceed in a reasonable manner, doing no unnecessary injury to the adverse party. *Great Falls Co. v. Worster*, 15 N. H. 412; *State v. Moffett*, 1 Greene (Iowa), 848.

In the removal of a nuisance the party abating it is liable to the owner only for a wanton or unnecessary injury; and, in determining whether this liability exists, the kind of property constituting the nuisance and the attending circumstances must be considered. *City of Indianapolis v. Miller*, 27 Ind. 394.

But a private person cannot abate a public nuisance unless it obstructs his own right (*Brown v. Perkins*, 78 Mass. [12 Gray] 89); and occasions him some damage not shared by the rest of the community. *Fort Plain Bridge Co. v. Smith*, 30 N. Y. (3 Tiff.) 44; see *Francis v. Schoellkopf*, 53 N. Y. (8 Sick.) 152.

4. Abatement of nuisance. a more proper place hereafter to inquire. At present we may observe generally, that whatsoever unlawfully annoys or does damage to another, is a nuisance; and such nuisance may sometimes be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it (*l*). If a wall is erected so near to my house that it stops my ancient lights, which is a private nuisance, I may enter my neighbour's land, and peaceably pull it down. Likewise if a bar or gate be wrongfully erected across the public highway, which is a common nuisance, any of the queen's subjects passing that way may, if necessary for the exercise of that right, cut it down and destroy *it (*m*). And the reason why [*6] the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.

Before proceeding to abate a nuisance, a notice to remove it is sometimes requisite (*n*).

5. Distress. A fifth case, in which the law allows a man to be his own avenger, or to minister redress to himself, is that of distress, whether for rent in arrear or damage feasant, which has been noticed in our preceding volume. (432)

6. Seizure of heriot. The seizing of a heriot when due on the death of a tenant is another species of self-remedy, likewise already noticed (*o*).

II. Such being the several remedies which may be had by the mere act of the party injured, those will next be mentioned which arise from the joint act of all the parties.

1. Accord and satisfaction as between the party injuring and the party injured, will bar an action for such injury. If a man contract to build a house or deliver a horse, and fail in it; for this breach of contract the sufferer may have his remedy by action; but if he accept a sum of money, or other thing, as a satisfaction, this may operate as a redress of his grievance, and entirely take away his right *of [*7] action (*p*). (433) But payment of a less sum cannot be *per se* an accord and satisfaction of a greater ascertained sum (*q*).

(*l*) *Penruddock's Case*, 5 Rep. 100; *Baten's Case*, 9 Rep. 55.

(*m*) *Dimes v. Petley*, 15 Q. B. 276; *Bateman v. Bluck*, 18 *id.* 870. In *Hyde v. Graham*, 1 H. & C. 598, Pollock, C. B., referring to the instances above given, "where a person is allowed to obtain redress by his own act, as well as by operation of law" (*post*, p. 11), observes that such "occasions are very few," and "might constantly lead to breaches of the peace; for if a man has a right to remove a gate placed across the land of another, he

would have a right to do it even though the owner was there and forbade him. The law of England appears to me, both in spirit and on principle, to prevent persons from redressing their grievances by their own act."

(*n*) *Jones v. Williams*, 11 M. & W. 176; *Perry v. Fitzhove*, 8 Q. B. 757; *Davies v. Williams*, 16 *id.* 546; *Dimes v. Petley*, 15 *id.* 276.

(*o*) *Ante*, vol. ii.

(*p*) *Blake's Case*, 6 Rep. 43; *Peytoe's Case*, 9 Rep. 79.

(*q*) *Sibree v. Tripp*, 15 M. & W. 23.

(432) Many of the States in the Union have, by express statute, abolished the remedy by distress for rent. See note 217, Vol. 1, *ante*, 471.

(433) It has been held in some of the United States that a satisfaction moving from a stranger will not constitute a bar to a right of action. *Daniels v. Hallenbeck*, 19 Wend. 408; *Clow v. Borst*, 6 Johns. 37; *Stark's Adm'r's v. Thompson's Ex'r's*, 3 Monr. (Ky.) 296.

But this doctrine has not been universally adopted. *Leavitt v. Morrow*, 6 Ohio St. 71;

2. Arbitration is where the parties, injuring and injured, submit matters in dispute, concerning any personal chattel or personal wrong, to the judgment

2. Arbitration. of two or more arbitrators, who are to decide the controversy;

and if they do not agree, it is usual to add, that another person be called in as umpire (*imperator* or *impar* (*r*)), to whose sole judgment it is then referred (*s*): or one arbitrator may be originally appointed. The decision, in any such case, is called an award. And, if the award stands, the question is thereby as fully determined, and the right, which was in contest, transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice. The right to real property, however, could

(*r*) Whart. Angl. Sacr. i. 772; Nicols. Scot. (s) See 17 & 18 Vict. c. 125, s. 14. Hist. Libr. ch. 1, *prope finem*.

Heaton v. Angier, 7 N. H. 397. An accord and satisfaction by one of several joint obligors is valid. *Strang v. Holmes*, 7 Cow. 224; *Knickerbacker v. Colver*, 8 id. 111; *Merchants' Bank v. Curtiss*, 37 Barb. 317; *Ellis v. Bitzer*, 2 Ham. 89.

In order that an accord and satisfaction shall be a legal bar to an action it must be full, perfect and complete. *Clark v. Dinsmore*, 5 N. H. 136; *Frentress v. Markle*, 2 Greene (Iowa), 553. An accord not executed is no bar to an action on a pre-existing demand. *Coit v. Houston*, 8 Johns. Cas. 243; *Mayfield v. Cotton*, 21 Texas, 1; *Blackburn v. Ormsby*, 41 Penn. St. 97; *Mansur v. Keaton*, 46 Me. 346; *Cushing v. Wyman*, 44 id. 121; *Tuckerman v. Newhall*, 17 Mass. 581; *Spring v. Lovett*, 11 Pick. 417; *Williams v. Stanton*, 1 Root (Conn.), 426; *Woodward v. Miles*, 24 N. H. 289. But an agreement to accept a new contract in satisfaction and discharge of a former contract or debt is a good accord executed, whether the new contract is performed or not. *Ib.*; *Thatcher v. Dudley*, 2 Root (Conn.), 169; *Goodrich v. Stanley*, 24 Conn. 621; *Palmer v. Yager*, 20 Wis. 91; *Babcock v. Hawkins*, 23 Vt. 561.

The payment of a less sum than the full amount of a liquidated demand, and its acceptance in full satisfaction, will not be a bar to an action for the residue. *Harriman v. Harriman*, 12 Gray (Mass.), 341; *Bunge v. Koop*, 48 N. Y. (3 Sick.) 225; *Warren v. Skinner*, 20 Conn. 561; *Rose v. Hall*, 26 id. 395; *Harper v. Graham*, 20 Ohio, 105; *Mathewson v. Stratford Bank*, 45 N. H. 104; *Williams v. Langford*, 15 B. Monr. (Ky.) 566; *Markel v. Splitter*, 28 Ind. 488; *Ryan v. Ward*, 48 N. Y. (3 Sick.) 204.

But part payment of an unliquidated demand, or of a disputed demand, will be a bar to an action for the residue, if accepted in full satisfaction of the demand. *McDaniel v. Lapham*, 21 Vt. 222; *Bateman v. Daniels*, 5 Blackf. (Ind.) 71; *Palmerton v. Huzford*, 4 Denio, 166; *Pierce v. Pierce*, 25 Barb. 243; *Marvin v. Treat*, 37 Conn. 96; 9 Am. Rep. 307.

So the acceptance of a sum less than is due in full satisfaction of a demand will operate as a bar to an action for the recovery of the residue, if the part payment was made before the debt was due (*Harper v. Graham*, 20 Ohio, 105; *Goodnow v. Smith*, 18 Pick. 414; *Brooks v. White*, 2 Metc. [Mass.] 283); or at another place than that stipulated. *Harper v. Graham*, 20 Ohio, 105; *Rose v. Hall*, 26 Conn. 295; *Fenwick v. Phillips*, 3 Metc. (Ky.) 88; *Smith v. Brown*, 8 Hawks. (N. C.) 580.

So the delivery and acceptance of any collateral thing of any value, though less than the amount of the debt or demand, will be a bar to an action, if delivered and received as a satisfaction for the claim. *Blynn v. Chester*, 5 Day, 380; *LePage v. McCrea*, 1 Wend. 164; and see *Reed v. Bartlett*, 19 Pick. 273.

The acceptance of the note of a third person in full payment of a demand. *Kellogg v. Richards*, 14 Wend. 116; *LePage v. McCrea*, 1 id. 164; *Brooks v. White*, 2 Metc. (Mass.) 283; *Stagg v. Alexander*, 55 Barb. 70. Or of the debtor's note with security. *Boyd v. Hitchcock*, 20 Johns. 76.

Or even the negotiable note of the debtor himself, for a less sum than the original demand, may be pleaded as an accord and satisfaction in bar of an action to recover more than the amount secured by such note. *Harper v. Graham*, 20 Ohio, 105; see 2 Am. Lead. Cas. 263. The payment of any sum accepted as a satisfaction of damages for a personal injury is sufficient. *Lovrie v. Verner*, 8 Watts (Penn.), 317.

In some of the United States the effect of part payment in satisfaction of a demand has been declared by statute.

not formerly have thus passed by a mere award (*t*): which subtilty had its rise from feudal principles; for if this had been permitted, the land might have been aliened collusively without the consent of the superior. But an arbitrator may now award a conveyance or a release of land; and it will be a breach of the arbitration-bond to refuse compliance (*u*). (434) For though originally the submission to arbitration used to be by word or in writing, yet both of these being revocable in their nature, it became a common practice for the parties to enter into mutual bonds, with conditions to stand to the award of the arbitrators therein named. (435) And experience having shown the

(*t*) 1 Roll. Abr. 242; *Marks v. Marriot*, 1 Ld. Raym. 114, 115. (u) And see the 17 & 18 Vict. c. 125, s. 16.

(434) But few traces of the old English doctrine denying the right of arbitration in matters affecting the title to real estate are to be found in this country. In nearly all of the United States it is a well-settled rule that any dispute whatever, relating to realty, may be the subject of arbitration. *Penniman v. Rodman*, 54 Mass. (18 Metc.) 382; *Philbrick v. Preble*, 18 Me. 255; *Carey v. Wilcox*, 6 N. H. 177; *Akley v. Akley*, 16 Vt. 450; *Blanchard v. Murray*, 15 id. 548; *Clark v. Burt*, 4 Cush. 396; *Blair v. Wallace*, 21 Cal. 317. In the State of New York the submission to arbitration of any claim to a freehold in real estate is prohibited by statute, and absolutely void. *Wiles v. Peck*, 26 N. Y. (12 Smith) 42. But this statute is narrowly construed and is held to forbid the submission of claims to an estate in lands only where the controversy is as to the legal title, and not where the equitable title only is in dispute. *Olcott v. Wood*, 14 N. Y. (4 Kern.) 32.

(435) *Form of submission.* The form of the submission of a controversy to arbitrators has in many of the United States been made the subject of express legislation. If the statute of a State requires that the submission be in writing, an oral submission will be void. See *Jones v. Payne*, 41 Ga. 28; *McClendon v. Kemp*, 18 La. Ann. 162.

So if the statute requires that the instrument be under seal, the seal becomes an indispensable formality. *Hamilton v. Hamilton*, 27 Ill. 158.

The distinction between a common-law arbitration and an arbitration under the statute should not be overlooked, although in many cases the statutes relating to arbitrations are merely cumulative, and do not affect common-law submissions. *Allen v. Chase*, 3 Wis. 249; *Conger v. Dean*, 3 Clarke (Iowa), 463; *Overly v. Overly*, 1 Metc. (Ky.) 117; *Fink v. Fink*, 8 Clarke (Iowa), 313. When such is the case, an oral submission may be valid as a common-law arbitration, although invalid under the statute. *Ib.*; *Miller v. Goodwine*, 29 Ind. 46; *Carter v. Scaggs*, 38 Mo. 302.

At common law the submission may be oral or in writing, sealed or unsealed. *Titus v. Seantling*, 4 Blackf. (Ind.) 89; *Jones v. Boston Mill Corporation*, 5 Pick. 148; *Clark v. Burt*, 4 Cush. 396; *Winne v. Elderkin*, 1 Chand. (Wis.) 219; *Byrd v. Odem*, 9 Ala. 755.

If the subject of arbitration is such that the parties can contract concerning it only by writing, then an oral submission will be void; and if only by writing under seal then an oral submission will be void. *Valentine v. Valentine*, 2 Barb. Ch. 430. In all other cases an oral submission will be valid. *Smith v. Douglass*, 16 Ill. 34.

A parol submission of questions involving the title to real estate, or of an interest therein, is void under the statute of frauds. *Philbrick v. Preble*, 18 Me. 255; *Walters v. Morgan*, 2 Cox's Ch. 369; *McMullen v. Mayo*, 8 Smedes & Marsh. 298.

If the dispute is as to the effect or validity of a sealed instrument the submission must be under seal. *Logsdon v. Robert's Ex'rs*, 3 Monr. 255.

And where from the subject of arbitration a writing is necessary to pass the right to the thing in demand, or to defeat or destroy the demand, the submission and award must be in writing. *Ib.*; *French v. New*, 28 N. Y. (1 Tiff.) 147; *Smith v. Douglass*, 16 Ill. 34; *Martin v. Chapman*, 1 Ala. 278. A written submission to arbitration will supersede one first made verbally. *Symonds v. Mayo*, 10 Cush. (Mass.) 39; *Freeman v. Beadle*, 2 Root (Conn.), 492.

Revocation. In the absence of any statutory restriction, an agreement to submit to arbitration is, in general, revocable by either party, at any time before the award is made (*Marsh v. Packer*, 20 Vt. 198; *Davis v. Maxwell*, 27 Ga. 368; *Tobey v. County*, 3 Story, 800;

great use of these peaceable and domestic tribunals, especially in matters of account, and other mercantile transactions, which may be difficult of adjustment on a trial at law, the *legislature has by several statutes sanctioned the use of arbitrations as well in controversies depending in

Johnson v. Andress, 5 Phila. [Penn.] 8; *Leonard v. House*, 15 Ga. 478; and an award made after revocation is void. *Wood v. Finn*, 1 Penn. Law Jour. Rep. 896. A revocation, in order to be effectual, must be express and positive, and coupled with no conditions whatever. *Goodwine v. Miller*, 82 Ind. 419.

If the submission be in writing, the revocation must be written (*Sutton v. Tyrrell*, 10 Vt. 91); and if the submission be under seal, so also must be the revocation. *Wallis v. Carpenter*, 13 Allen (Mass.), 19; *Brown v. Leavitt*, 26 Me. 251. A submission under seal cannot be revoked by parol. *McFarlane v. Cushman*, 21 Wis. 401; *Mullins v. Arnold*, 4 Sneed (Tenn.), 262; *Van Antwerp v. Stewart*, 8 Johns. 42. The instrument of revocation need not be formal or even grammatical in its language. If a clear intention to revoke can be gathered from the entire document, full operation will be given to it. *Frete v. Frete*, 1 Cow. 335.

If one of the parties to the submission dies pending the arbitration, the occurrence, as a general rule, is a revocation of the arbitrator's authority. *Dexter v. Young*, 40 N. H. 130; *Power v. Power*, 7 Watts (Penn.), 205; *Marseilles v. Kenton's Executors*, 17 Penn. St. 238. So, a revocation is effected where an arbitrator dies before award made. *Sutton v. Tyrrell*, 10 Vt. 91; *Potter v. Sterrett*, 24 Penn. St. 411.

Revocation may be made through the intervention of an agent, but he must be actually authorized to revoke. *Madison Ins. Co. v. Griffin*, 8 Ind. 277.

Arbitrator's authority. A submission entered into *in pais* and not in a *lis pendens*, or under a statute, constitutes the sole source of the arbitrator's power (*Boston Water-Power Co. v. Gray*, 6 Metc. [Mass.] 131); and, as a general rule, his power is limited to the determination of precisely the questions which are submitted. *Robinson v. Moore*, 17 N. H. 479; *Cook v. Carpenter*, 34 Vt. 121; *Hayes v. Forskoll*, 13 Me. 112; *Butler v. Mayor, etc., of New York*, 7 Hill, 329. He has no power to modify the question submitted. *Wyman v. Hammond*, 55 Me. 534. Nor can he do general equity. *Shearer v. Handy*, 23 Pick. (Mass.) 417; *Culver v. Ashley*, 17 id. 98. But he may dispose of such matters as are necessarily or properly incidental to or comprised within the precise question submitted. *Boston Water-Power Co. v. Gray*, 6 Metc. (Mass.) 131.

The only party entitled to object to the award, on the ground of the exercise of excessive authority by the arbitrator, is the party prejudiced thereby. *Galvin v. Thompson*, 13 Me. 387; *Lyman v. Arms*, 5 Pick. (Mass.) 213.

When the award is to be made. If no time is specified within which an award must be made, it may be made at any time. *Small v. Thurlow*, 37 Me. 504; *Saunders v. Heaton*, 12 Ind. 20; *Nichols v. Rensselaer Ins. Co.*, 22 Wend. 125. But if the time has been limited, an award cannot be made after the expiration of such time, without consent of parties. *Smith v. Spencer*, 1 McCord's Ch. (S. C.) 92; *Hall v. Hall*, 8 Conn. 308; *White v. Puryson*, 10 Yerg. (Tenn.) 441; *Buntain v. Curtis*, 27 Ill. 874.

How made and published. Unless it is otherwise provided by the parties, all the arbitrators must concur in the award; and under a submission to three, an award by two is bad. *Welty v. Zentmyer*, 4 Watts (Penn.), 75; *Patterson v. Leavitt*, 4 Conn. 50; *Towne v. Jacquith*, 6 Mass. 46; *Smith v. Walden*, 26 Ga. 249; *Payne v. Moore*, 2 Bibb (Ky.), 163; *Eames v. Eames*, 41 N. H. 177; *Jeffersonville R. R. Co. v. Mounts*, 7 Ind. 689. But, when several arbitrators are appointed, and one refuses to act, the award of the other arbitrators will be valid (*Kile v. Chapin*, 9 Ind. 150); and, where, on a submission to three, one dissents from the award of the other two, who execute it without him, the award is valid. *Batty v. Button*, 13 Johns. 187.

Publication of an award is necessary only where it is expressly stipulated for by the submission. *Parsons v. Aldrich*, 6 N. H. 264. Execution of an award in duplicate, and delivery of one of the duplicate originals to each party, is a publication (*Plummer v. Morrill*, 48 Me. 184); and where an award, duly made and sealed up, was left with one of the arbitrators, and the parties appeared before him, and the award was then read to them at their request, it was held sufficient publication to give effect to the award. *Rundell v. La Fleur*, 6 Allen (Mass.), 480; see *Knowlton v. Homer*, 30 Me. 553.

court, as in those where no action has been brought. By 9 & 10 Will. 3, c. 15, it was enacted, that all merchants and others, desirous of ending any controversy, suit, or quarrel (for which there is no other remedy but by personal

Form and execution of award. Where the submission prescribes no formalities to be observed in the execution of the award, no especial formula is required. Any language expressing an actual decision is sufficient. *Ott v. Schrappel*, 5 N. Y. (1 Seld.) 483. And in the absence of statutory restrictions, or of stipulations in the submission, and except where the right to be disposed of is, by its own nature, capable of being disposed of only by a sealed instrument, a verbal award is sufficient. *M'Manus v. M'Culloch*, 6 Watts (Penn.), 357; *Jones v. Dewey*, 17 N. H. 596; *Valentine v. Valentine*, 2 Barb. Ch. 430; *Philbrick v. Preble*, 18 Me. 255. So, it is never necessary that an award should be under seal, unless it is required by the terms of the submission or by statute (*White v. Fox*, 29 Conn. 570; *Owen v. Boerum*, 23 Barb. 187; *Crabtree v. Green*, 8 Ga. 8); nor need it be attested by subscribing witnesses. *Valle v. North Missouri R. R. Co.*, 37 Mo. 445; *Hedrick v. Judy*, 23 Ind. 548.

The award must contain the actual decision of the arbitrators, but nothing more is necessary. They are not bound to go into particulars, and assign reasons for their award (*Blossom v. Van Amringe*, 68 N. C. 65; *Patterson v. Baird*, 7 Ired. Eq. [N. C.] 255; *Lamphire v. Cowan*, 39 Vt. 420); nor are they bound to make the evidence a part of their award. *Allen v. Miles*, 4 Harr. (Del.) 284.

Words written in the margin of an award by the arbitrators, in a distinct sentence, are to be considered as part of the award, and to receive the same construction as if inserted in the body of it. *Platt v. Smith*, 14 Johns. 368.

Awards are to be liberally construed, according to the intention collected from the words of the whole (*Rixford v. Nye*, 20 Vt. 132; *Joy v. Simpson*, 2 N. H. 179; *Mulder v. Oravat*, 2 Bay. [S. C.] 370; *Jackson v. Ambler*, 14 Johns. 96; *Spear v. Hooper*, 23 Pick. [Mass.] 144; *Gonzales v. Deavans*, 2 Yeates [Penn.] 538); and, if possible, such construction will be given as to make them effective. *Ross v. Watt*, 16 Ill. 99; *Maryland, etc., R. R. Co. v. Porter*, 19 Md. 458; *Archer v. Williamson*, 2 Har. & Gill. 62; *Skilling v. Coolidge*, 14 Mass. 43. Arbitrators are not bound to employ technical words in their report, and their language is to be interpreted according to their obvious meaning. *Coze v. Lundy*, 1 N. J. L. (Coxe) 255.

It is held, that if one part of an award is irreconcilable with another, the first part shall prevail, and the latter be rejected. *Cox v. Jagger*, 2 Cow. 638.

Requisites of award. The award must be *final*. It must so determine and dispose of the controversies submitted, that they cannot become the basis of future litigation. *Waite v. Barry*, 12 Wend. 377. But the parties to the submission only are bound by the award. *Chapman v. Champion*, 2 Day (Conn.), 101; *Lamphire v. Cowan*, 39 Vt. 420; *Wyatt v. Benson*, 23 Barb. 327; *Richardson v. Lanning*, 26 N. J. L. (2 Dutch.) 130. As to such parties, a valid award has the force of an adjudication, and effectually concludes them from litigating the same matters anew. *Rogers v. Holden*, 18 Ill. 293.

An award ought also to be *certain* (*Pettibone v. Perkins*, 6 Wis. 616; *McCracken v. Clarke*, 31 Penn. St. 498; *Howard v. Babcock*, 21 Ill. 259); but certainty to a common intent only is sufficient. *Purdy v. Delavan*, 1 Caines, 804, 815. Technical precision and certainty are never necessary in an award. *Butler v. Mayor, etc., of New York*, 1 Hill, 489. If it is sufficiently certain to uphold a contract on the same subject it is good. *Perkins v. Giles*, 53 Barb. 342, 349; *Akely v. Akely*, 16 Vt. 450.

Another requisite of an award is *mutuality*; that is, an award must not be on one side only. By mutuality nothing more is meant, however, than that the thing awarded to be done should be a final discharge of all future claim by the party in whose favor the award is made, against the others, for the causes submitted, or, in other words, that it shall be final. *Cox v. Jagger*, 2 Cow. 638; *Spofford v. Spofford*, 10 N. H. 254; *Karthauss v. Ferrer*, 1 Pet. 222; *Purdy v. Delavan*, 1 Caines, 804.

Effect of award. A valid award of arbitrators is conclusive as to all matters submitted to them by the parties (*Keaton v. Mulligan*, 43 Ga. 308; *Girdler v. Carter*, 47 N. H. 305; *Ennos v. Pratt*, 26 Vt. 630; *Coleman v. Wade*, 6 N. Y. [2 Seld.] 44; *Fidler v. Cooper*, 19 Wend. 285; *Curly v. Dean*, 4 Conn. 259); and the prevalent doctrine is, that this is so, whether any particular matter included in the submission was laid before the arbitrators or not. *Fidler v. Cooper*, 19 Wend. 285; *Ott v. Schrappel*, 5 N. Y. (1 Seld.) 483; *Bunnell v.*

action or suit in equity), may agree, that their submission of the suit to arbitration or umpirage shall be made a rule of court, and may insert such agreement in their submission, or in the condition of the arbitration-bond (x):

(x) And now by the 17 & 18 Vict. c. 125, s. 17, every agreement or submission to arbitration in writing may be made a rule of court, unless a contrary intention appear therein

Pinto, 4 Conn. 431; *Briggs v. Brewster*, 23 Vt. 100. But see *Inhabitants of N. Yarmouth v. Inhabitants of Cumberland*, 6 Greenl. (Me.) 21; *Webster v. Lee*, 5 Mass. 334; *Edwards v. Stevens*, 1 Allen (Mass.), 315.

A valid award is a bar to an action upon the matters contained in the submission (*Brazil v. Isham*, 12 N. Y. [2 Kern.] 9; *Preston v. Whitcomb*, 11 Vt. 47; *Robinson v. Morse*, 26 id. 392); but if the award does not determine the matter submitted, there can, of course, be no bar. *Smith v. Holcomb*, 99 Mass. 552.

An award is inoperative for the purpose of actually passing title to land, even as between the parties to the submission. *Girdler v. Carter*, 47 N. H. 305; *Shelton v. Alcox*, 11 Conn. 240; *Cox v. Jagger*, 2 Cow. 638, 650; *Jackson v. Gager*, 5 id. 383; *Sellick v. Addams*, 15 Johns. 197; *Goudridge v. Dustin*, 5 Metc. (Mass.) 363.

A valid award needs no ratification. *Sears v. Vincent*, 8 Allen (Mass.), 507. It creates a complete obligation, which has its inception from the time when the award is made (Id.); and it cannot be repudiated by the mere act of one of the parties. *Hopson v. Doolittle*, 13 Conn. 236. But if both parties refuse to be bound by it, it is thereby rendered for ever null and inoperative; and the parties will be remitted to their original rights. *Marshall v. Piles*, 3 Bush (Ky.), 249; *Eastman v. Armstrong*, 26 Ill. 216. A valid award, long concurred in, must be held conclusive of the rights of the parties. *Jarvis v. Fountain Water Co.*, 5 Cal. 179; *Peniston v. Somers*, 15 La. Ann. 679.

Where a question of law alone is submitted to arbitration, the award is binding, although the decision is contrary to law. *Smith v. Smith*, 4 Rand. (Va.) 95.

An award, published by arbitrators on the express condition that neither party was to be bound, is not binding. *Sartwell v. Horton*, 23 Vt. 370. So it is held that a decision of arbitrators which is expressly made subject to future alterations upon the suggestion of errors by the parties, does not constitute a valid award. *McCrory v. Harrison*, 36 Ala. 577.

Review of award. The mode and extent of a judicial review of an award may be provided for by statute or by a reservation in the submission. In the absence of such provision an award cannot be reviewed in the courts on the ground that the arbitrators have erred in judgment as to the law or fact. *Jenkins v. Meagher*, 46 Miss. 84; *Perkins v. Giles*, 50 N. Y. (5 Sick.) 228; *Sabin v. Angel*, 44 Vt. 523; *Mitchell v. De Schamps*, 13 Rich. (S. C.) 9; *Speer v. Bidwell*, 44 Penn. St. 23; *Moore v. Barnett*, 17 Ind. 349; *Conrad v. Johnson*, 20 Ind. 421; *Burroughs v. David*, 7 Clarke (Iowa), 154. But when the arbitrators have manifestly fallen into such an error with regard to the facts or law in the cases before them as must have prevented the free and fair exercise of that judgment, the award will be set aside. *Sanborn v. Murphy*, 50 N. H. 65; *White Mountains R. R. v. Beane*, 89 id. 107. And it may be stated as a general rule, that one who objects to an award must show an excess of authority, misbehavior, partiality or corruption on the part of the arbitrators. *Jenkins v. Meagher*, 46 Miss. 84; *Sabin v. Angell*, 44 Vt. 523; *McCullough v. Mitchell*, 42 Ga. 495; *Bennett v. Russell*, 34 Miss. 524; *Richardson v. Lanning*, 2 Dutch. (N. J.) 130.

Under a charge against arbitrators of fraud and corruption, plain and gross error in their award will be admissible evidence of the charge; but the error must be very plain and palpable to afford any evidence of corruption. *Perkins v. Giles*, 50 N. Y. (5 Sick.) 228.

A mistake in law on the part of the arbitrators as to what is submitted to their decision will avoid the award. *Walker v. Walker*, 1 Wins. (N. C.) No. 1, 259.

An award which is good in part and bad in part may be sustained so far as it is good if the good can be so separated from the bad as to prevent injustice. *Day v. Hooper*, 51 Me. 178; *Rawson v. Hall*, 56 id. 142; *Whitcher v. Whitcher*, 49 N. H. 176; 6 Am. Rep. 486, 498; *Parmalee v. Allen*, 32 Conn. 115. But if there be such connection between that which is good and that which is bad as would work injustice if the latter were stricken out, the whole award must fall. *De Groot v. United States*, 5 Wall. (U. S.) 419; *Whitcher v. Whitcher*, 49 N. H. 176; 6 Am. Rep. 486, 499; *Commonwealth v. Pejepscut Proprietors*, 7 Mass. 399; *Parmalee v. Allen*, 32 Conn. 115.

which agreement being proved upon oath by one of the witnesses thereto, the court shall make a rule that such submission and award shall be conclusive; and, after such a rule made, the parties disobeying the award shall be liable to be punished, as for a contempt of the court; unless such award be set aside for corruption or other misbehaviour in the arbitrators or umpire (*y*), proved on oath to the court, within one term after the award is made. Under this statute, the superior courts interfered to set aside awards when partially or illegally made; or to enforce their execution, when legal, by process of contempt.

By the above statute, however, of 9 & 10 Will. 3, a parol submission could not be made a rule of court, and the remedy by arbitration still remained defective; for a party might at any time before the award was made, or after it was made, but before the agreement was made a rule of court, revoke his submission, a power which was frequently exercised where one of the parties had by some means ascertained that the arbitrator was unfavourably disposed towards him. Besides this, an arbitrator had no power to compel the attendance of a witness, or to administer an oath to him; and therefore if a witness on either side was *unwilling to give evidence, it was not safe to con- [* 9] sent to an arbitration, and the evidence being given without the sanction of an oath, the proceeding by arbitration was less satisfactory than that before a jury. It was accordingly deemed expedient yet further to extend and improve the remedy by arbitration, and several provisions contained in the statute 3 & 4 Will. 4, c. 42, were directed to this object. By sect. 39, it was provided that if the submission contained an agreement that it should be made a rule of court, it should not be revocable without leave of the court or a judge. By sect. 40, the court or a judge was empowered to command the attendance and examination of any person, or the production of any document; and sect. 41 enabled the arbitrators or umpire to administer an oath, and has subjected a witness wilfully giving false evidence, in the matter of an arbitration, to the penalties of perjury.

Other material improvements have been made in the law of arbitrations, by the statute 17 & 18 Vict. c. 125, as well by amending the pre-existing law upon this subject (*z*), as by enabling the court or a judge to compel a reference to arbitration either before or at the time of trial, where the matter in dispute consists, wholly or in part, of items of mere account, which cannot conveniently be tried (*a*). Under the provisions first alluded to, an action commenced by one of the parties to the reference after all have agreed thereto may be stayed (*b*), where the parties cannot concur in the appointment of an arbitrator, he may be appointed upon summons by a judge (*c*); where the reference is to two arbitrators, and one party fails to appoint, the other party may appoint an arbitrator to act alone (*d*), and the award, unless when otherwise agreed or ordered, is to be made within three months, if the term for making *it be not enlarged (*e*). The latter series of provisions (*f*) [* 10] regulate the procedure, where the reference is compulsory, and *inter alia* empowered the arbitrator to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the court (*g*).

(*y*) As to the grounds of setting aside an award, see Russell on Arbitr. 3rd ed. Chaps. ix—xi. *Re Hopper*, 36 L. J., Q. B. 97.

(*z*) Ss. 11—17.

(*a*) Ss. 3 (amended by 21 & 22 Vict. c. 74, s. 5), 6.

(*b*) S. 11.

(*c*) S. 12.

(*d*) S. 18.

(*e*) S. 15.

(*f*) Ss. 8—10.

(*g*) S. 5.

[* 11]

* CHAPTER II.

REDRESS OF PRIVATE WRONGS BY THE OPERATION OF LAW.

THE remedies for private wrongs, which are effected by the mere operation of law, will fall within a very narrow compass: the principal are these, known as, I. Retainer, (where a creditor is made executor or administrator to his debtor). II. Set-off. III. Remitter, to which may be added, IV., the effect of the marriage of parties in certain cases.

I. If a person indebted to another makes his creditor or debtee his executor (*a*), or if such creditor obtains letters of administration (*b*) to his debtor; in

I. Retainer. these cases the law gives him a remedy for his debt, by allowing

him to retain so much as will pay himself, before any other creditors whose debts are of equal degree. (436) This is a remedy by the mere act of law, and grounded upon this reason; that the executor cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity: but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor, he would be put in a worse condition than all the rest of the world besides. For, though a rateable payment of all the debts of the deceased, in equal degree, is clearly the most equitable method,

[* 12] yet as * every scheme for a proportionable distribution by an executor or administrator, of the assets among all the creditors has been hitherto found to be impracticable, and productive of more mischiefs than it would remedy; so that the creditor who first commences his suit is entitled to a preference in payment; it follows, that as the executor can commence no suit, he must be paid the last of any, and of course must lose his debt, in case the estate of his testator should prove insolvent, unless he be allowed to retain it. The doctrine of retainer is therefore the necessary consequence of that other doctrine of the law, the priority of such creditor who first commences his action. But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation, as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt, in prejudice to that of his co-execu-

(a) 1 Roll. Abr. 922; *Woodward v. Darcy*, v. *Green*, 1 Brownl. 75. See Williams on Executors, 6th ed. pp. 971 *et seq.*

(b) *Warner v. Wainford*, Hob. 127; *Bond*

(436) This remedy of retainer has no existence in this country; and a creditor, who is also an executor, has not, by virtue of his office, any right to the payment of his debt in preference to other debts of the same class due to other creditors. All the individual interest which an executor, as a creditor of the estate of his testator, can have in the funds of the estate, is a right to the payment of his debt, or a rateable proportion thereof, out of the assets, upon a settlement of the estate. *Chavez v. Schmidt*, 17 N. J. (2 Green) 257; *Rogers v. Hosack's Executors*, 18 Wend. 319; *Chaffin v. Chaffin*, 2 Dev. & Bat. Ch. 255; *Lenoir v. Winn*, 4 Desauss. 65.

tor in equal degree; but both shall be discharged in proportion (c). Nor shall an executor of his own wrong be permitted to retain (d), except in the case where he becomes so (e) through accepting a gift of the intestate's effects from an administrator who has obtained the grant fraudulently. Whether an executor might retain for a debt barred by the statute was formerly in some doubt; recent decisions, which may be accepted as settling the question, have established the right in this case also (f).

* II. Set-off is a right somewhat analogous to retainer; it exists where [* 13] there are cross demands between two persons. If a man has a claim for

a sum of money against another and is also indebted to him, he may consider his claim to be a discharge or extinguishment of his debt, if they be equal in amount, or *pro tanto* if unequal. This rule, founded upon reason and justice, inasmuch as it prevents unnecessary multiplication of suits and much inconvenience of other kinds, seems to have been adopted originally from the Roman Law (g). "*Ideo necessaria est compensatio, quia interest nostra potius non solvere quam solutum repetere*" is the statement in the Digest (h) of its foundation.

The doctrine was not, however, voluntarily accepted by our courts of common law, and in early times its benefit could only be obtained in courts of equity where it seems to have been always recognised (i). The obviously disastrous consequences of not admitting it in the event of the bankruptcy of one of the parties led to its recognition by the legislature in that case (k). And not long afterwards the same supreme authority interfered to permit a set-off to be pleaded at law in general cases (l). * There are various rules and con- [* 14] ditions which regulate the application of the doctrine, into which we cannot appropriately enter here at any length. They depend upon the nature of the relation existing between the parties and the character of the conflicting claims. Thus where the claims are in different rights (m), or where one is for

(c) *Chapman v. Turner*, 11 Vin. Abr. 72, tit. Exors. D. 2; *S. C.* 9 Mod. 268.

(d) *Coulter's Case*, 5 Rep. 30; *S. C.* Cro. Eliz. 630.

(e) By 43 Eliz. c. 8, the statute expressly reserves the right of retainer.

(f) *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Hill v. Walker*, 4 K. & J. 166; *Sharman v. Rudd*, 27 L. J., Ch. 844. In the analogous case of remitter, however, the rule seems to be that there is no remitter to an estate a right to which would be barred by the statute, see *post*, p. 14 n. (p), and p. 16. Upon the general law of Retainer, see *Williams on Executors, ubi sup.*, and *Stammers v. Elliott*, L. R. 3 Ch. 195.

(g) This was the opinion of Sir Thomas Clarke. See *Whitaker v. Rush*, Amb. 407.

(h) Lib. xvi. tit. 2. De Compensationibus. In a comment on "*necessaria*," it is said, "*Id est cum lis possit uno iudicio definiri, scilicet per actionem et exceptionem, pluralitas seu multitudo iudiciorum non debet admitti, ut quæ incommoda sumptusque adferat; quin etiam compensationem æquitas poscere videtur, nam dolo facit qui petit quod restitutus est.*" Corp. Jur. Civ. Dion. Gothofredi, 1615.

(i) *Downam v. Matthew*, Prec. Chan. 580; 1 Ch. 499; *Anon.*, 1 Mod. 215; *Curzon v. Afri-*

can Co., 1 Vern. 121; *Chapman v. Derby*, 2 Vern. 117; *Peters v. Soame*, 2 Vern. 428; *Jeffs v. Wood*, 2 P. W. 128; *Green v. Farmer*, 4 Burr. 2220.

(k) The first statute is 4 & 5 Anne, c. 17. Subsequent Acts allowing set-off in bankruptcy are, 5 Geo. 1, c. 11; 5 Geo. 2, c. 30, s. 28; 46 Geo. 3, c. 125, s. 8; 12 & 13 Vict. c. 106, s. 172, which last regulates the law as now in force. The law will, after the close of this year (1869) be regulated by 32 & 33 Vict. c. 71, s. 36.

(l) 2 Geo. 2, c. 22, s. 12, made perpetual by 8 Geo. 2, c. 24, s. 4, and see s. 5. See also *Isberg v. Bowder*, 8 Exch. 852. A form of plea is given in Sch. B. No. 41, of the Common Law Procedure Act, 1852, and see, besides, 23 & 24 Vict. c. 126, s. 21.

(m) *West v. Pryce*, 2 Bing. 555; *Wood v. Smith*, 4 M. & W. 525. *Groom v. Mealey*, 2 Bing. N. C. 188; *Bishop v. Church*, 8 Atk. 691; *Whitaker v. Rush*, Amb. 407; *Chapman v. Derby*, 2 Vern. 117; *Mardall v. Thellusson*, 6 E. & B. 976; *Rees v. Watts*, 11 Exch. 410. Unless the circumstances are very special, *Freeman v. Lomas*, 9 Hare. 109; *Bousfield v. Lawford*, 1 De G. J. & S. 459. See also *Stammers v. Elliott*, L. R. 4 Eq. 675; and on appeal, 8 Ch. 195.

unliquidated damages or for tort, the other being a common debt of fixed amount (*n*), or where the debt in respect of which set-off is claimed accrued after the commencement of the action (*o*), no set-off will be allowed, and it would seem that set-off may not be asserted in respect of a debt barred by the Statutes of Limitations (*p*).

Courts of equity, having a wider cognisance of rights and claims than courts of law, are still (*q*) sometimes *resorted to for the protection afforded [* 15] by the right of set-off: they, however, to a great extent observe conditions similar to those established as rules at law (*r*).

III. Remitter is where he who has the true property or *jus proprietatis* in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath afterwards the freehold

III. Remitter. cast upon him by some subsequent, and of course defective, title; in this case he is remitted, or sent back by operation of law, to his ancient and more certain title (*s*). The right of entry, which he has gained by a bad title, shall be *ipso facto* annexed to his own inherent good one: and his defeasible estate shall be utterly defeated and annulled, by the instantaneous act of law, without his participation (*t*). As if A. disseises B., that is, turns him out of possession, and dies, leaving a son, C.; hereby the estate descends to C., the son of A., and B. is barred from entering thereon till he proves his right in an action (*t*): now, if afterwards C., the heir of the disseisor, makes a lease for life to D., with remainder to B. the disseisee for life, and D. dies; hereby the remainder accrues to B., the disseisee: who thus gaining a new freehold by virtue of the remainder, which is a bad title, is by act of law remitted, or in of his former and surer estate (*u*). For he hath hereby gained a new right of possession, to which the law immediately annexes his ancient right of prop- [* 16] erty. And it may be remarked that *this takes place whatever may be his will or intention. He is remitted *volens volens* (*x*).

If the subsequent estate, or right of possession, be gained by a man's own act or consent, as by immediate purchase being of full age, he shall not be remitted. For the taking such subsequent estate was his own folly, and shall

(*n*) *Bell v. Corey*, 8 C. B. 887; *Crompton v. Walker*, 3 E. & E. 821; *Thompson v. Redman*, 11 M. & W. 487.

(*o*) *Richards v. James*, 2 Ex. 471; and see for further illustrations the cases *Pratt v. Keith*, 33 L. J. Ch. 528; *In re Bank of Hindostan, Smith's Case*, L. R. 3 Ch. 125; *Ander-son's Case*, L. R. 3 Eq. 387.

(*p*) *Chapple v. Durston*, 1 Cr. & J. 1; *Fairthorne v. Donald*, 13 M. & W. 424. This appears however a somewhat harsh rule: in analogous cases, such as lien, the statutes are disregarded, *Spears v. Hartley*, 3 Esp. 81; *Higgins v. Scott*, 2 B. & Ad. 413; and see *Mills v. Fowkes*, 5 Bing. N. C. 455. Again, V.-C. Kindersley held, in *Edwards v. Waugh* (L. R. 1 Eq. 418, overruling the M. R. in *Mason v. Broadbent*, 33 Beav. 296), that a mortgagee may retain out of moneys produced by sale of the mortgaged properties more than six years' interest, notwithstanding 3 & 4 Will. 4, c. 27, s. 42. And in the case of a legacy to a debtor whose debt is barred, it is now quite established that the executor may set off the legacy against the debt, *Courtenay v. Williams*, 3 Hare, 539; *Coates v. Coates*, 33 Beav.

249. It is to be observed that the statutes, 21 Jac. 1, c. 16, and 3 & 4 Will. 4, c. 42, only take away the remedy and not the right; the other Act, 3 & 4 Will. 4, c. 27, takes away the right also.

(*q*) *Jones v. Moore*, 4 Y. & C. 351; *Baillie v. Edwards*, 3 H. L. Ca. 74; *Macmahon v. Burckell*, 3 Hare, 97; *Jones v. Mossop*, 3 Hare, 568.

(*r*) See the principles regulating set-off in equity stated in *Clarke v. Cort*, Cr. & Ph. 154; *Ranson v. Samuel*, *ib.* 161; *Freeman v. Lomas*, 9 Hare, 109, and illustrated in *Cavendish v. Geaves*, 24 Beav. 163; *Courtenay v. Williams*, 3 Hare, 539; *Jones v. Mossop*, 3 Hare, 568; *Alvanley v. Lewis*, 1 L. J. (N. S.) Ch. 55; *In re Commercial Bank*, L. R. 2 Ch. 538; *In re Overend, Gurney and Co. (Grissell's Case)*, *ib.* 528.

(*s*) Litt. s. 659. This and the following thirty-seven sections of Littleton's treatise contain a large variety of cases of remitter.

(*t*) Co. Litt. 348; Cro. Jac. 489.

(*u*) Finch. L. 194; Litt. s. 688.

(*x*) Litt. s. 690; Com. Dig. Remitter, B. 3; *Doe d. Daniell, v. Woodroffe*, 2 H. L. 811.

be looked upon as a waiver of his prior right (*y*). Therefore it is to be observed, that to every remitter there are regularly these incidents; an ancient right, and a new defeasible estate of freehold in possession, uniting in one and the same person; which defeasible estate must be cast upon the rightful owner not gained by his own act: except, indeed, in the case of an infant or married woman, against whom the law will not adjudge folly (*z*).

The reason given by Littleton (*a*), why this remedy, which operates silently, and involuntarily, by the mere act of law, was allowed, is somewhat similar to that given for retainer; because otherwise he who hath right would be deprived of all remedy. For as he himself is the person in possession of the freehold, there is no other person against whom he can bring an action, to establish his prior right. And for this cause the law doth adjudge him in by remitter; that is, in such plight as if he had lawfully recovered the same land by suit. For, as Lord Bacon observes (*b*), the benignity of the law is such, as when, to preserve the principles and grounds of law, it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse. *Nam quod remedio destituitur, ipsa re valet si culpa absit*. But there shall be no remitter to a right which is extinguished, or for which the party has no remedy by action (*c*): as if it be barred by the Statute of Limitations (*d*): or if * under the law as it stood prior to the act abol- [*17] ishing fines, the issue in tail had been barred by the fine of his ancestor and the freehold was afterwards cast upon him; he was not remitted to his estate tail (*e*): for the operation of the remitter is exactly the same, after the union of the two rights, as that of a real action would have been before it. As therefore the issue in tail could not by any action have recovered his ancient estate, he could not recover it by remitter. Of course under the present law there can be no remitter to an estate tail barred by a disentailing assurance duly executed by the ancestor. Inasmuch as the possession of one coparcener, joint tenant, or tenant in common is not the possession of any other (*f*), therefore if one be remitted to any of these estates no advantage accrues to any other (*g*).

IV. Besides the remedies of retainer, remitter, and set-off, we may here mention another mode whereby a right may be extinguished by operation of law, and so in a manner a wrong may be considered as redressed. If a woman marry her creditor or debtor, in either case the debt is absolutely extinguished (*h*). (437) The debt, however, must be

IV. Marriage of debtor and creditor.

- (*y*) Co. Litt. 348, 350.
- (*z*) Co. Litt. 349, 351, 352.
- (*a*) S. 661.
- (*b*) Elem. r. 9.
- (*c*) Co. Litt. 349.
- (*d*) See *Doe d. Daniell v. Woodroffe*, 10 M. & W. 608; 15 M. & W. 768; 2 H. L. Ca. 811; in which case the law concerning remitter was much discussed.
- (*e*) *Anon. Moor.* 115; *Minter v. Collins*, 1 Andr. 286; *Doe d. Daniell v. Woodroffe, ubi sup.*
- (*f*) *Culley v. Taylerson*, 11 A. & E. 1008; *Burroughs v. McCreight*, 1 J. & L. 290; 3 & 4 Will. 4, c. 27, s. 12.
- (*g*) *Doe d. Daniell v. Woodroffe, ubi sup.*
- (*h*) Co. Litt. 264, b.

(437) In many of the United States the relations of husband and wife have been materially changed by legislative enactment, and the common-law rules as to the rights of property during coverture have been essentially modified and in some cases abrogated. Thus, since the act for the protection of the rights of married women in the State of New York, the marriage of a female mortgagee with the mortgagor does not extinguish her right of action upon the mortgage. *Power v. Lester*, 23 N. Y. (9 Smith) 527; see *ante*, Vol. 1, p. 361, note 151; *id.*, 364, note 152.

one which, if existing, would be payable during the coverture, otherwise it is not extinguished; for instance, if a bond be given to a woman in contemplation of her marriage with the obligor, conditioned to pay a sum of money to her or her representatives after the obligor's death, this bond would be valid, notwithstanding the marriage (i).

[*18] * And thus much for these extrajudicial remedies, as well for real as personal injuries, which are furnished or permitted by the law, where the parties are so peculiarly circumstanced, as not to make it eligible, or in some cases even possible, to apply for redress in the usual and ordinary methods to the courts of public justice.

[*19]

* CHAPTER III.

COURTS IN GENERAL.

THE next, and principal, object of our inquiries is redress by suit in court: wherein the act of the parties and the act of law co-operate; the act of the parties being necessary to set the law in motion, and the process of the law being in general the only instrument by which the parties are enabled to procure a certain and adequate redress.

And here it will not be improper to observe, that although in the several cases of redress by the act of the parties mentioned in a former chapter (a), the law allows an extrajudicial remedy, yet that remedy is not compulsory, and does not exclude the ordinary course of justice; it is only an additional weapon put into the hands of persons in particular instances, where natural equity or the peculiar circumstances of their situation require a more expeditious remedy, than the formal process of a court of judicature can furnish. Therefore, though I may defend myself from external violence, I yet am afterwards entitled to an action of assault and battery: though I may retake my goods, if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action: I may either enter on the lands, on which I have a right of entry, or may demand possession by action: I may either abate a nuisance by my own authority, or call upon the law to do it for me: I may [*20] distrain for rent, * or have an action of debt, at my own option: if I do not distrain my neighbour's cattle damage-feasant, I may compel him by action to make me a fair satisfaction for the damage done; if a heriot be withheld from me by fraud or force, I may recover it though I never seized it. And with regard to accords and arbitrations, either of these, being in its nature merely an agreement or compromise, indisputably supposes a previous right of obtaining redress some other way; which is given up by such agreement. And as to remedies by operation of law, those are indeed given, because no remedy can be administered by suit or action, without running into the palpable absurdity of a man's bringing an action against himself: the two

(i) *Cage v. Acton*, 1 Raym. 515; S. C. 1 Salk. 825, and *sub. nom.*; *Acton v. Peirce*, 3 Vern. 480; *Melbourne v. Ewart*, 5 T. R. 381. (a) Chap. I.

cases wherein they happen being such, that the only possible legal remedy would have to be directed against the very person who seeks relief.

Otherwise, however, it is a rule, that where there is a legal right, there is a legal remedy, by suit in court or by application to a court of justice, whenever that right is invaded. And in treating of such remedy, I shall now consider the nature of courts in general; and shall afterwards inquire as to the several species of courts, the jurisdiction of each, and the method of obtaining the redress which it affords.

A court is defined to be a place wherein justice is judicially administered (b). (438) And, as by our constitution the sole executive power of the laws is vested in the person of the sovereign, courts of justice, which are the medium by which he administers the laws, are derived from the power of the crown (c). For, whether created by act of parliament, or letters patent, or subsisting by prescription (the only methods by which any court of judicature can exist (d)), the royal consent in the two former is expressly, and in the latter is impliedly, given. *In these [*21] courts the sovereign is supposed in contemplation of law to be always present; or at least is there represented by the judges, whose power is but an emanation of the prerogative.

For the more speedy and impartial administration of justice between subject and subject, the law has appointed various courts, some with a more limited, others with a more extensive jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal. These will be taken notice of in their respective places: and here one distinction only that runs throughout them need be noticed;

viz. between courts of record and courts not of record. A court of record is that whose acts and judicial proceedings are enrolled for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and super-eminent authority, that their truth is not to be called in question. (439) For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or

(b) Co. Litt. 58.

(d) Co. Litt. 260.

(c) See Bk. I. chap. 7.

(438) The term "place," as given in this definition, must be understood as embracing more than the mere idea of locality, if the definition itself is to be retained and applied to the word court in its modern signification. In these days the term "court" is applied as well to those who administer justice as to the place where it is administered; and the judges who preside at the place of meeting are often called the court. A court has been defined as "an organized body with defined powers, meeting at certain times and places for the hearing and decision of causes and other matters brought before it, and aided in this, its proper business, by its proper officers, *viz.*, attorneys and counsel to present and manage the business, clerks to record and attest its acts and decisions, and ministerial officers to execute its commands and secure due order in its proceedings." See Burrill's Dict.; 1 Walt's Pr. 221.

Where an authority is created by statute, with power to fine or imprison, the officer, person or body invested with such authority is, for that purpose, deemed a court. *Case of the Twelve Commitments*, 19 Abb. Pr. 894; *Briggs v. Mackellar*, 2 id. 80, 61.

(439) It is not easy to give a satisfactory definition to the term "court of record." It has been held that a court of record is one which has jurisdiction to fine or imprison, or one having jurisdiction of civil cases above forty shillings, and proceeding according to the course of the common law. *Woodman v. Somerset*, 87 Me. 29.

It has also been defined as a court, or judicial, organized tribunal, having attributes and

even proof, unless where fraud is involved, be admitted to the contrary (e). (440) And if the existence of a record be denied, it shall be tried by nothing but itself: that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But, if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are said to be the queen's courts, in right of her crown and royal dignity (f), and no other court has authority to fine or imprison for a contempt; so that the very erection of a new jurisdiction with such power makes it a court of record (g).

(e) Co. Litt. 280.

(f) Finch. l. 281.

(g) *Groenvelt v. Burnell*, Salk. 200; *Gren-*

ville v. Coll. of Physicians, 12 Mod. 388. See
Inhabitants of Oldbury v. Stafford, 1 Sid. 145.

exercising functions, independently of the person of the magistrate designated generally to hold it. *Ex parte Gladhill*, 8 Metc. (Mass.) 168, 170.

Whether a court is or is not a court of record does not depend upon the fact that it does or does not keep a record of its proceedings, or that it is or is not required by law to do so. *Woodman v. Somerset*, 37 Me. 29.

In a number of cases it has been intimated that a court which does not proceed according to the course of the common law, but derives its authority wholly from statute, is not a court of record. *Snyder v. Wise*, 10 Penn. St. 157.

A court may be a court of record for some purposes and not for others. *Wheaton v. Fellows*, 23 Wend. 875; *Lester v. Redmond*, 6 Hill, 590; *Ex parte Gladhill*, 8 Metc. (Mass.) 168; *Thayer v. Commonwealth*, 12 id. 9; *Mowry v. Chessman*, 72 Mass. (6 Gray) 515.

(440) It is a general rule that no averment is admissible to contradict a judgment, or to dispute any legitimate inference deducible therefrom. *White v. Merritt*, 7 N. Y. (3 Seld.) 353; *Davis v. Talbot*, 12 N. Y. (3 Kern.) 184.

But this rule does not estop a party from impeaching a domestic judgment obtained through fraud. *People v. Mayor, etc., of New York*, 19 How. 289; *Louder v. Mayor, etc., of New York*, 26 Barb. 265; *Denton v. Denton*, 41 id. 221; *Whetstone v. Whetstone*, 31 Iowa, 276; *Cowin v. Toole*, id. 513; *Ellis v. Kelly*, 8 Bush (Ky.), 621.

Whether or not the judgment of one State can be attacked for fraud in obtaining it in the courts of another State is not well settled. That such fraud is not a good common-law defense, see *Christmas v. Russell*, 5 Wall. 290; *Denton v. Burgett*, 10 Serg. & Rawle, 240; *Anderson v. Anderson*, 8 Ohio, 108; *Sanford v. Sanford*, 28 Conn. 6, 28; *M' Rae v. Mattoon*, 18 Pick. 58.

That a foreign judgment may be impeached for fraud, see *Engel v. Scheuerman*, 2 Am. Rep. 573; 40 Ga. 206; *Dunlap v. Cody*, 7 Am. Rep. 129; 31 Iowa, 260; *Rogers v. Winn*, 21 id. 58; *Kerr v. Kerr*, 41 N. Y. (2 Hand) 272; *Hoffman v. Hoffman*, 46 N. Y. (1 Sick.) 30.

That a foreign judgment may be impeached for want of jurisdiction appearing from the record, see *Davis v. Headley*, 22 N. J. Eq. 115.

That statements in the record of the judgment of a court of another State of facts which, if true, gave that court jurisdiction, may be shown to be untrue, see *Hoffman v. Hoffman*, 46 N. Y. (1 Sick.) 30; *Kerr v. Kerr*, 41 N. Y. (2 Hand) 272; *Carleton v. Pickford*, 13 Gray, 591; *Folger v. Columbian Ins. Co.*, 99 Mass. 267; *Rape v. Heaton*, 9 Wis. 328; *Norwood v. Cobb*, 24 Texas, 521; *Christmas v. Russell*, 5 Wall. 290.

To the contrary, see *Newcomb v. Peek*, 17 Vt. 302; *Lapham v. Briggs*, 27 id. 26; *Wilcox v. Kassick*, 2 Mich. 165; *Wilson v. Jackson*, 10 Mo. 329; *Wetherill v. Stillman*, 65 Penn. St. 105; *Westcott v. Brown*, 18 Ind. 88; *Lincoln v. Tower*, 2 McLean, 478; *Roberts v. Caldwell*, 5 Dana, 512.

Whether notice was given to the defendant of the pendency of the action is always open to inquiry. *Christmas v. Russell*, 5 Wall. 290.

And in all cases the courts of the State in which a judgment of a court of another State is sought to be enforced have a right to inquire how far the judgment presented may be conclusive in the State in which it was rendered. *McLaren & Co. v. Kehler*, 8 Am. Rep. 591; 23 La. Ann. 80.

As exemplifying the nature of a court not of record * may be [* 22]
 instanced the court-baron incident to a manor, where the proceedings
 are not enrolled or recorded; but as well their existence as the
 not of record. truth of the matters therein contained may, if disputed, be tried
 and determined by a jury.

In every court there must be three constituent parts, the *actor*, *reus*, and
judez: the *actor*, or plaintiff, who complains of an injury done; the *reus*, or
 defendant, who is called upon to make satisfaction for it; and
 its constituent parts. the *judez*, or judicial power, whose duty it is to examine the
 truth of the fact, to determine the law arising upon that fact, and, if any
 injury appears to have been done, to ascertain, and by its officers to apply the
 remedy. It is also usual in a court of justice to have attorneys or solicitors,
 and advocates or counsel, as assistants.

An attorney at law, or a solicitor, answers to the *procurator*, or proctor, of
 the civilians and canonists (*h*), and is one put in the place, stead, or turn of
 another, to manage his matters of law. Formerly every suitor
 was obliged to appear in person, to prosecute or defend his suit,
 unless by special licence under the king's letters patent (*i*). And an idiot
 cannot at this day appear by attorney, but must do so in person (*k*), for he has
 not discretion to enable him to appoint a proper substitute. But, as in the
 Roman law, "*cum olim in usu fuisset, alterius nomine agi non posse, sed, quia
 hoc non minimam incommoditatem habebat, ceperunt homines per procuratores
 litigare*" (*l*), so with us, upon the same principle of convenience, it was per-
 mitted in general, by divers ancient statutes, whereof the first was statute
 Westm. 2, c. 10, that an attorney might be made to prosecute or defend any
 action in the absence of the parties to the suit. These attorneys are now
 formed into a regular corps; they are admitted to the * execution of [* 23]
 their office by the superior courts of law and equity; and are officers of
 the respective courts in which they are submitted to practice: and, as they have
 many privileges on account of their attendance there, so they are peculiarly
 subject to the censure and animadversion of the judges (*m*). The duty of an
 attorney towards his client flows from his retainer, and he is liable for gross
 negligence in conducting the business which he undertakes (*n*). (441)

(*h*) Pope Boniface VIII. in 6 Decretal. l. 8, t. 16, s. 4, speaks of *procuratores* "*qui in aliquibus partibus attorney nuncupantur.*"

(*i*) F. N. B. 25.

(*k*) *Ibid.* 27.

(*l*) Inst. 4, tit. 10.

(*m*) The law relating to attorneys was con-

solidated by the 6 & 7 Vict. c. 73, and has been amended by stats. 7 & 8 Vict. c. 86; 14 & 15 Vict. c. 88; 38 & 39 Vict. c. 127.

(*n*) *Fray v. Voules*, 1 E. & E. 839; *Prestwich v. Poley*, 18 C. B., N. S. 806; *Chown v. Parrott*, 14 C. B., N. S. 74.

(441) Whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, for that loss the attorney is responsible. *Gilbert v. Williams*, 8 Mass. 51; *Cox v. Livingston*, 2 Watts & Serg. 108; *Wilcox v. Plummer's Ex'rs*, 4 Peters, 172.

But it is a fair presumption that an attorney acts according to his instructions, unless in a case of such gross negligence that a violation may be inferred. *Holmes v. Peck*, 1 R. I. 242. An attorney is responsible for the want of or the neglect to use ordinary skill and care in the exercise of his profession. *Holmes v. Peck*, 1 R. I. 242; *Walpole v. Carlisle*, 32 Ind. 415; *Stevens v. Walker*, 55 Ill. 151; *O'Barr v. Alexander*, 37 Ga. 195; *Hill v. Barney*, 18 N. H. 607.

But he will not be held responsible if he acts with a proper degree of attention, with reasonable care, and to the best of his skill and knowledge. *Gilbert v. Williams*, 8 Mass. 51; *Stevens v. Walker*, 55 Ill. 151.

Of advocates, or (as we generally call them) counsel, there are two species or degrees; barristers, and serjeants. The former are admitted, subject to regulations before noticed (*o*), by the inns of court; and are in Counsel.

our old books styled apprentices, *apprenticii ad legem*, having been formerly looked upon as merely learners, and not qualified to execute the full office of an advocate till they were of sixteen years' standing; at which time, according to Fortescue (*p*), they might be called to the state and degree of serjeants (*q*), or *servientes ad legem*.

From amongst members of the outer bar some are from time to time selected to be her majesty's counsel learned in the law: the two principal of whom are called her attorney, and solicitor-general. The first king's counsel, under the degree of serjeant, was sir Francis Bacon, who was made so *honoris causâ*, without either patent or fee (*r*); so that the first of the modern order (who [* 24] are now the sworn *servants of the crown, with a nominal standing salary) seems to have been sir Francis North, afterwards Lord Keeper of the Great Seal to King Charles II. (*s*). These queen's counsel answer, in some measure, to the advocates of the revenue, *advocati fisci*, among the Romans. For they must not be employed in any cause against the crown without special licence: in which restriction they agree with the advocates of the fisc (*t*): but in the imperial law the prohibition was carried still further, and perhaps was more for the dignity of the sovereign; for, excepting some peculiar causes, the fiscal advocates were not permitted to be at all concerned in private suits between subject and subject (*u*). A custom has for many years prevailed of granting letters patent of precedence to such barristers, as the crown thinks proper to honour with that mark of distinction: whereby they are entitled to such rank and pre-audience as are assigned in their respective patents. These, as well as the attorney and solicitor-general (*v*), rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts; but receive no salaries, and are not sworn; and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately may take upon themselves the protection and defence of suitors, who are therefore called their clients, as were the dependants upon the ancient Roman orators. Those indeed practised gratis, for honour merely, or at most for the sake of gaining influence; and so likewise it is established with us, that a counsel can maintain no action for his fees; which are given, not as *locatio vel conductio*, but as *quiddam* [* 25] *honorarium* (*x*); not as a salary *or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation (*y*); as is also laid down with regard to advocates in the civil law (*z*), whose *honor-*

(*o*) *Ante*, vol. i. App.

(*p*) *De Leg.* c. 50.

(*q*) As to which see the late Mr. Serjeant Manning's learned work, entitled "*Serviens ad Legem*." By custom the judges of the courts of Westminster are always admitted to the degree of the coif, before they are advanced to the bench; the origin of which was probably to qualify the puisné barons of the exchequer to become justices of assize, according to the exigence of the statute 14 Edw. 3, c. 116. *Fortesc.* c. 50.

(*r*) See his Letters, 256.

(*s*) See his life by Roger North, 37; Manning's *Serviens ad Legem*, 209, 210.

(*t*) *Cod.* 2, 9, 1.

(*u*) *Ibid.* 2, 7, 13.

(*v*) *Seld.* Tit. Hon. 1, 6, 7.

(*z*) *Kennedy v. Broun*, 18 C. B., N. S. 677; *Broun v. Kennedy*, 33 L. J., Ch. 71, 842; *Swinfen v. Lord Chelmsford*, 5 H. & N. 918.

(*y*) See judgm. *Kennedy v. Broun*, *supra*

(*z*) *Dig.* 11, 6, 1.

arium was directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80*l.* of English money (*a*). (442)

(*a*) Tac. Ann. 1, 11, 7.

(442) 1. RETAINER.

What a sufficient retainer. As it regards the retainer of an attorney, less formality is observed in the American than in the English practice. A written retainer, though proper, is seldom required; a mere parol retainer being sufficient to authorize an attorney to commence a suit (*Manchester Bank v. Fellows*, 28 N. H. [8 Fost.] 302), whether in case of a corporation or individual. *Ib.* So, it is a general rule, that where an attorney undertakes to appear for a party in a cause, a retainer will be presumed; and the court will look no further as to his authority. *Jackson v. Stewart*, 6 Johns. 84; *Brown v. Nichols*, 42 N. Y. (3 Hand) 26; *Hamilton v. Wright*, 87 N. Y. (10 Tiff.) 503; *Proprietors v. Bishop*, 2 Vt. 231; *Post v. Haight*, 1 How. 171; *Pillsbury v. Dugan*, 9 Ohio, 117; *Hayes v. Shattuck*, 21 Cal. 51; *Williams v. Butler*, 35 Ill. 544; *Hains v. Galbraith*, 43 id. 309; *Henck v. Todhunter*, Har. & J. (Md.) 275; *Osborn v. Bank of United States*, 9 Wheat. 738. In the absence of fraud or collusion in the case, the court will proceed, and leave the party who may be injured by an unauthorized appearance, to his remedy by action. *Tally v. Reynolds*, 1 Ark. 99; *State v. Carothers*, 1 Greene (Iowa), 464; *Beckley v. Newcomb*, 24 N. H. (4 Fost.) 359. And see cases cited above. The attorney's authority to appear may also be inferred from circumstances; as, that he was the general attorney of the defendant, and the defendant, though knowing it, did not object to his appearance. *Bogardus v. Livingston*, 2 Hilt. 236. And the acceptance of service of process by an attorney of record on behalf of his client will, in the absence of proof to the contrary, be presumed to have been authorized. *Conrey v. Brenham*, 1 Ia. Ann. 397; *Dobbins v. Dupree*, 39 Ga. 394.

One co-defendant may employ an attorney for the co-defendants, and the appearance by such an attorney for all will bind all. *Abbott v. Dutton*, 44 Vt. 546. So, in the absence of proof to the contrary, an attorney appearing for an infant plaintiff will be presumed to have been employed by the plaintiff's guardian or next friend. *Hilliard v. Carr*, 6 Ala. 557.

Proof of retainer. Although the license of an attorney is *prima facie* evidence of his authority to appear for any person whom he professes to represent, he may, nevertheless, be compelled by the court to show his authority, at the instance of either party to the suit. *People v. Mariposa Co.*, 39 Cal. 683; *Commissioners of Excise of N. Y. v. Purdy*, 36 Barb. 266; *Rogers v. Park*, 4 Humph. (Tenn.) 480; *West v. Houston*, 3 Harr. (Del.) 15; *Ninety-nine plaintiffs v. Vanderbilt*, 4 Duer, 632. A parol authorization is sufficient (*Manchester Bank v. Fellows*, 28 N. H. [8 Fost.] 302; *Hardin v. Ho-yo-po-nubby*, 27 Miss. 567; *Hirschfeld v. Landman*, 3 E. D. Smith, 208); and, as between the plaintiff and the defendant, the attorney is himself a competent witness to prove it. *Ib.*; *Pixley v. Butts*, 2 Cow. 431; *Tullock v. Cunningham*, 1 id. 256; *Caniff v. Myres*, 15 Johns. 246; *Folly v. Smith*, 12 N. J. L. (7 Halst.) 140. Where the attorney's authority to appear is denied by the opposite party, the burden of proof is upon the party denying (*Thomas v. Steele*, 22 Wis. 207); and he must state facts showing or tending to show that the attorney does not possess the authority which he assumes. Otherwise the presumption arising from his license and appearance will prevail. *People v. Mariposa Co.*, 39 Cal. 683.

2. AUTHORITY AND POWERS OF:

General extent of authority. As a general rule, the acts of the attorney, under a retainer, are binding upon the client. The retainer confers on the attorney all the powers exercised by the forms and usages of the court in which the suit is pending; and, in the absence of fraud, a client is concluded by the acts and omissions of his attorney. *Lewis v. Sumner*, 54 Mass. (18 Metc.) 269; *Smith v. Bossard*, 2 McCord (S. C.), 406; *Lawson v. Bettison*, 12 Ark. 401; *Bethel Church v. Carmack*, 2 Md. Ch. 143; *Greenlee v. McDowell*, 4 Ired. Eq. (N. C.) 431; *Chambers v. Hodges*, 23 Tex. 104; *Sampson v. Ohleyer*, 22 Cal. 200; *Russell v. Lane*, 1 Barb. 519; *Wieland v. White*, 109 Mass. 392; *Moulton v. Bowker*, 115 id. 36; *Jenney v. Delesdernier*, 20 Me. 153; *Rogers v. Greenwood*, 14 Minn. 333. Thus, a general authority to commence suits will warrant an attorney in commencing a suit and attaching property, and will render the client responsible for any damages occasioned thereby. *Fairbanks v. Stanley*, 18 Me. (6 Shep.) 296. But a plaintiff's attorney cannot, under his general authority, purchase land sold under an execution issued in the cause, for the benefit of, and as trustee

for, his client. *Beardsley v. Root*, 11 Johns. 464. So, a ratification of the proceedings of an attorney in a suit, if made without full knowledge of all the material facts, will not bind the client. *Williams v. Reed*, 8 Mas. C. C. 405.

Power to control proceedings in the suit. The right of an attorney of record to manage and control an action cannot be questioned while he remains such. Under his general authority, he may do all ordinary acts in the prosecution of the suit, or the final disposition of it. Thus, without any express power to do so being shown, he may discontinue the suit (*Gailard v. Smart*, 6 Cow. 385; *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. [6 Hand] 628); restore an action after *vol. pros.* (*Reinholdt v. Alberti*, 1 Binn. [Penn.] 469); release from attachment the property of the debtor attached in the suit (*Monson v. Hawley*, 30 Conn. 51; *Moulton v. Bouker*, 115 Mass. 86); permit a sheriff to renew an execution in the name of the client. *Cheever v. Mirrick*, 2 N. H. 376. So he may verify, by affidavit, a petition in *scire facias* (*Wright v. Parks*, 10 Iowa, 842); may have briefs printed at the expense of his client (*Weisse v. New Orleans*, 10 La. Ann. 46); may waive a verification (*Smith v. Mulliken*, 2 Minn. 319), and in cases of special attachment, he may do all acts which the interests of his clients may require. *Pierce v. Strickland*, 2 Story, 292.

An attorney under his general authority cannot, however, enter a *retraxit* (*Lambert v. Sanford*, 2 Blackf. [Ind.] 187); nor release a garnishee from his attachment (*Quarles v. Porter*, 12 Mo. 76); nor assign a judgment (*Fassitt v. Middleton*, 47 Penn. St. 214; *Head v. Gervais*, Walk. [Miss.] 431); nor admit service for his client of an original process by which the court obtains jurisdiction for the first time of his person (*Musterson v. LeClaire*, 4 Minn. 168), or release the liability of a witness to pay a part of the costs. *Bowen v. Hyde*, 6 Barb. 392; *Marshall v. Nagel*, 1 Bailey (S. C.), 308; *Springer v. Whipple*, 17 Me. 351. So an attorney, under his general authority, cannot consent to the entry of a judgment against his client, without his assent (*People v. Lamborn*, 2 Ill. [1 Scam.] 123); nor can he release a claim of his client on a third person for the purpose of making such person a competent witness for his client (*Shores v. Caswell*, 54 Mass. [13 Metc.] 418), or release an indorser of a note, in order to render him competent to testify in an action against the maker. *East River Bank v. Kennedy*, 9 Bosw. 573. And a general power to defend a cause will not authorize the attorney to execute an appeal bond in his client's name. *Holbrook's Case*, 5 Cow. 35; *Clark v. Courser*, 29 N. H. (9 Fost.) 170. An attorney at law has authority, by virtue of his employment as such, however, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action. *Wieland v. White*, 109 Mass. 392; *Rice v. Wilkins*, 21 Me. 558; *Pierce v. Strickland*, 2 Story, 292; *Moulton v. Bouker*, 115 Mass. 86.

Authority to demand and receive payment. An attorney, by virtue of his retainer, may demand and receive payment of his client's money. *Langdon v. Potter*, 13 Mass. 319; *Bryans v. Taylor*, Wright (Ohio), 245; *Ruckman v. Allwood*, 44 Ill. 163; *Ducett v. Cunningham*, 39 Me. 386; *Megary v. Funtis*, 5 Sandf. 376. Payment to the attorney is payment to his client. *Ely v. Harvey*, 6 Bush (Ky.), 620; *Carroll County v. Cheatham*, 48 Mo. 385. But the rule is well established that, without the express authority of his client, an attorney is not authorized to receive any thing but money in payment of a debt intrusted to him for collection. *Huston v. Mitchell*, 14 Serg. & Rawle, 307; *Wilkinson v. Holloway*, 7 Leigh (Va.), 277; *Moye v. Cogdell*, 69 N. C. 93; *Wright v. Daily*, 26 Tex. 730; *Givens v. Briscoe*, 3 J. J. Marsh. (Ky.) 534; *Kent v. Riccords*, 3 Md. (Ch.) 392; *Harper v. Harvey*, 4 W. Va. 539; *Trumbull v. Nicholson*, 27 Ill. 149. So an attorney employed to collect a debt has no authority to release the sureties upon his client's claim (*Savings Inst. v. Chinn*, 7 Bush [Ky.], 539); or to receive other securities in payment of the demand (*Jeter v. Haviland*, 24 Ga. 252; *Walker v. Scott*, 18 Ark. 644); or to sell the claim (*Rowland v. Stone*, 58 Penn. St. 196; *Noonan v. Gray*, 1 Bailey [S. C.], 437; *Card v. Walbridge*, 18 Ohio, 411; *Penniman v. Patchen*, 5 Vt. 346), nor to transfer a promissory note put in his hands for collection. *Child v. Eureka, etc., Works*, 44 N. H. 354; *Russell v. Drummond*, 6 Ind. 216; *Terhune v. Colton*, 10 N. J. Eq. (2 Stockt.) 21.

An attorney may, however, receive partial payments on any claim put in his hands for collection (*Pickett v. Bates*, 3 La. Ann. 627); and under his general authority to collect a note, he is authorized to receive a payment of part in money, and the residue in a note for a short period of a person of undoubted responsibility. *Livingston v. Radcliff*, 6 Barb. 201. But he cannot bind his client by an agreement to set off his own debt in part payment of a debt due the client. *Child v. Dwight*, 1 Dev. & B. Eq. (N. C.) 171; *Chambers v. Miller*, 7 Watts (Penn.), 63.

The attorney on record of the plaintiff, in an action for the recovery of money, has authority to receive the amount of a judgment recovered by his client, and to discharge it. *Lewis v. Gamage*, 1 Pick. (Mass.) 847; *Brackett v. Norton*, 4 Conn. 517; *Canterberry v. Commonwealth*, 1 Dana (Ky.), 416; *Wilson v. Stokes*, 4 Munf. (Va.) 455. But he has no authority to execute a satisfaction of judgment on behalf of his client, without payment; and even where the attorney holds the judgment by assignment, as security for debts due from the client, his satisfaction without payment is good only for the amount of his interest. *Beers v. Hendrickson*, 45 N. Y. (6 Hand) 665.

Authority to make settlements and compromises. An attorney has no authority, arising from his employment in that capacity, to compromise the claim of his client (*Abbe v. Rood*, 6 McLean, 106; *Holker v. Parker*, 7 Cranch, 436; *Spears v. Ledergerber*, 56 Mo. 465; *Moye v. Cogdell*, 69 N. C. 98; *Adams v. Roller*, 35 Tex. 711); or to settle a suit and conclude the client in relation to the subject in litigation without his consent. *Shaw v. Kidder*, 2 How. 244; *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. (6 Hand) 628, 635; *Lewis v. Gamage*, 1 Pick. (Mass.) 847; *Derwort v. Loomer*, 21 Conn. 245; *Davidson v. Roster*, 23 Mo. 387; *Filby v. Miller*, 25 Penn. St. 264; *Vail v. Jackson*, 15 Vt. 314. But a compromise, acquiesced in for years by the principal, will bind him forever (*Mayer v. Foulkrod*, 4 Wash. C. C. 511); and an agreement or compromise of a suit by an attorney, even though made without special authority, will not be interfered with unless it is so unreasonable as to warrant a belief that the attorney was imposed upon or did not exercise his judgment fairly. *Potter v. Parsons*, 14 Iowa, 286; *Holker v. Parker*, 7 Cranch, 436. So it is held that an attorney who is director in a railroad company, and is openly employed to prosecute a suit against the road, may compromise the suit, and recover his fees for legal services in the case. *Christie v. Sawyer*, 44 N. H. 298.

An attorney employed to bring or to defend an action has authority to submit the cause to arbitration (*Talbot v. McGee*, 4 T. B. Monr. [Ky.] 877; *Inhabitants of Buckland v. Inhabitants of Conway*, 16 Mass. 396; *Scarborough v. Reynolds*, 12 Ala. 252; *Stokely v. Robinson*, 34 Penn. St. 315; *Coleman v. Grubb*, 23 id. 398; *Holker v. Parker*, 7 Cranch, 436; *Abbe v. Rood*, 6 McLean, 106); but the exercise of this authority appears to be limited to the case where there is a cause pending, which the attorney has been employed to manage. *Jenkins v. Gillespie*, 18 Miss. (10 Smedes & Marsh.) 31. In Pennsylvania, an attorney cannot affect his client's title to real estate by entering into any agreement or submission, whether in a pending cause or not. *Houston v. Mitchell*, 14 Serg. & Rawle, 307; *Naglee v. Ingersoll*, 7 Penn. St. 185; *Pearson v. Morrison*, 2 Serg. & Rawle, 20.

Authority to make admissions, etc. An attorney, under his general authority as such, may admit facts on the trial or in pleading, waive a right of appeal, review, notice, etc., and confess judgment. *Alton v. Gilmanton*, 2 N. H. 520; *Rogers v. Greenwood*, 14 Minn. 333; *Talbot v. McGee*, 4 T. B. Monr. (Ky.) 877; *Lyon v. Williams*, 42 Ga. 168; *Smith v. Dixon*, 3 Metc. (Ky.) 438; *Pike v. Emerson*, 5 N. H. 393. So, an agreement by him to refer a cause is binding upon his client (ib.; *Tiffany v. Lord*, 40 How. 481; *Yates v. Russell*, 17 Johns. 461; *Buckland v. Conway*, 16 Mass. 396; *Smith v. Dixon*, 3 Metc. [Ky.] 438); and so are admissions of payment made by an attorney. *Wenans v. Lindsey*, 2 Miss. (1 How.) 557. The attorney may also bind his client by the admission of a fact for the purpose of trial (*Storke v. Kenan*, 11 Ala. 319; *Furners' Bank v. Sprigg*, 11 Md. 389); by a stipulation substantially settling the issues to be tried (*Bingham v. Supervisors*, 6 Minn. 136); by a waiver of all informalities and irregularities (*Hanson v. Hoitt*, 14 N. H. 56); by consenting to an order of the court (*Hart v. Spaulding*, 1 Cal. 213); or by making proper agreements in regard to the suit (*Farmers' Trust, etc., Bank v. Kelchum*, 4 McLean's C. C. 120). But a client is not bound by a contract entered into on his behalf by the attorney, without authority conferred, or subsequent ratification by the former (*Ireland v. Todd*, 36 Me. 149); and a stipulation by the attorney not to appeal, or seek a new trial, will not bind his client. *People v. Mayor, etc., of New York*, 11 Abb. 66. So, a waiver of trial by jury in criminal cases is not binding on the defendant if it be made by his attorney without consulting him, even though he was present in court. *Brown v. State*, 16 Ind. 496; see *Cancemi v. The People*, 18 N. Y. (4 Smith) 128.

Control of judgment or execution. An attorney, by virtue of his general employment to prosecute a suit, has no authority to discharge a judgment, unless on full payment of the amount (*Beers v. Hendrickson*, 45 N. Y. [6 Hand] 665; *Wilson v. Wadleigh*, 36 Me. 496); nor to assign the judgment or execution (id.); nor to direct the sheriff what property to levy upon on the execution (*Averill v. Williams*, 4 Denio, 295), nor to consent to vacate a

judgment which is pending and secured on appeal. *Quinn v. Lloyd*, 36 How. 878; 5 Abb. N. S. 281. But his power extends to opening a default which he has taken, and vacating the judgment entirely, even though his client has instructed him to the contrary: *Read v. French*, 28 N. Y. (1 Tiff.) 285. It is held that the attorney of a judgment creditor has implied authority to direct the sheriff as to the time and manner of enforcing the execution (*Willard v. Goodrich*, 81 Vt. 597; *Gorham v. Gale*, 7 Cow. 789; *Erwin v. Blake*, 8 Pet. 18; *Lynch v. Commonwealth*, 16 Serg. & Rawle, 868); to discharge a defendant from arrest on a *ca. sa.* issued by him (*Hopkins v. Willard*, 14 Vt. 474; *Scott v. Seiler*, 5 Watts [Penn.], 235); to stay execution upon a judgment (*Silvis v. Ely*, 8 Watts & Serg. [Penn.] 420), or to take out execution on a judgment recovered by him for his client, and to procure a satisfaction thereof by a levy on lands, or otherwise, and to receive the money due on the execution. *Union Bank v. Geary*, 5 Pet. 98; *Erwin v. Blake*, 8 id. 18. But he has no implied authority to release property levied on under execution (*Banks v. Evans*, 18 Miss. [10 Smedes & Marsh.] 35); nor to discharge an execution in favor of his client unless upon payment of its whole amount (*Jewett v. Wadleigh*, 33 Me. 110); nor to release a judgment obtained by him for his client (*Harrow v. Farrow*, 7 B. Monr. [Ky.] 126); nor to release the sureties of his client's debtor (*Givens v. Briscoe*, 3 J. J. Marsh. [Ky.] 532); nor to purchase real estate under his client's execution (*Washington v. Johnson*, 7 Humph. [Tenn.] 468); nor to stay an execution as to a principal debtor so as to discharge a surety (*Union Bank v. Gowan*, 18 Miss. [10 Smedes & Marsh.] 35), nor to discharge the defendant from execution on a *ca. sa.* without satisfaction. *Kellogg v. Gilbert*, 10 Johns. 220; *Simonton v. Burrell*, 21 Wend. 802.

Authority in auxiliary proceedings. It is a general rule that an attorney is only authorized to appear and act for his client in the proceedings which constitute a part of the action. Thus, employment in the principal case does not give authority to appear in a suit for contempt. *Pitt v. Davison*, 37 Barb. 97; see *Headley v. Good*, 24 Tex. 232; *Walradt v. Maynard*, 3 Barb. 584. But an attorney who receives a note from his client to collect is warranted by his general retainer to bring a second suit on the note, after being nonsuited in the first, for want of sufficient proof of the execution of the note. *Jackson v. Wilson*, 12 Johns. 817.

Authority, when terminated. An attorney employed to take the care and management of a suit has a right to consider his employment as continuing to the end of the litigation, unless dismissed by his client (*Langdon v. Cusleton*, 30 Vt. 285); and his authority to act cannot be ended by himself alone to his client's detriment. *Love v. Hall*, 3 Yerg. (Tenn.) 408. The death of the client terminates the attorney's authority, and he cannot give nor receive notice of motions in the cause, before the successor, made a party in due form, has authorized him to act thereon. *Putnam v. Van Buren*, 7 How. 81; *Austin v. Monroe*, 4 Lans. 67; *Bulbi v. Duvel*, 3 Edw. Ch. 418; *Judson v. Love*, 35 Cal. 168; *Glenson v. Dodd*, 4 Metc. (Mass.) 333; *Risley v. Fellows*, 10 Ill. (5 Gilm.) 531; *Campbell v. Kincaid*, 3 T. B. Monr. (Ky.) 566. See *Succession of Liles*, 24 La. Ann. 490.

The authorities in some of the States hold that the general power of an attorney ceases with the entry of judgment for his client (see *Hinckley v. St. Anthony Falls, etc., Co.*, 9 Minn. 55; *Jackson v. Bartlett*, 8 Johns. 361; *Adams v. Fort Plain Bank*, 23 How. 45; *Egan v. Rooney*, 38 id. 121; *Richardson v. Talbot*, 2 Bibb [Ky.], 382); but in other cases it is held that his authority continues until the judgment is satisfied, unless previously revoked by the client. *Gray v. Wass*, 1 Me. (1 Greenl.) 257; *Nichols v. Dennis*, R. M. Charit. (Ga.) 188; *Flanders v. Sherman*, 18 Wis. 575.

3. CHANGE OF ATTORNEYS, ETC.:

Change of, by client. The relation of attorney and client requires the most unlimited confidence and perfect harmony, and a client has an absolute right to change his attorney at any stage of a suit; subject, however, to proper provisions for the rights of the attorney as to compensation, etc., which may have previously attached. *Hazlett v. Gill*, 5 Rob. 611; *Faust v. Repoor*, 15 How. 570; *Board of Supervisors v. Brodhead*, 44 id. 411; *Wells v. Hatch*, 43 N. H. 246; *Re Paschal*, 10 Wall. (U. S.) 488. And a change can only be made upon the order of the court. *Hoffman v. Van Nostrand*, 14 Abb. 336; *Mumford v. Murray*, Hopk. 369; *Sloo v. Law*, 4 Blatch. 268; *Walton v. Sugg*, Phill. L. (N. C.) 98.

Withdrawal of attorney. No attorney or solicitor can withdraw his name, after he has once entered it on the record, without leave of court. And while his name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the

service of notice upon him is as valid as if served on the party himself. *United States v. Curry*, 6 How. (U. S.) 106; see *Boyd v. Stone*, 5 Wis. 240; *Martinis v. Johnson*, 21 N. J. L. (1 Zab.) 289.

Authority of attorney to employ assistants or substitutes. An attorney has no implied authority to retain associate counsel, and charge his client with liability for their fees (*Pad-dock v. Colby*, 18 Vt. 485; *Voorhies v. Harrison*, 22 La. Ann. 85; *Cook v. Ritter*, 4 E. D. Smith, 253; *Scott v. Hazzie*, 18 Vt. 50); nor has he any implied authority to employ a substitute to act in his place. *Matter of Bleakley*, 5 Paige, 811; *Hitchcock v. M'Gehee*, 7 Port. (Ala.) 556; *Johnson v. Cunningham*, 1 Ala. 249; *Gillespie's Case*, 3 Yerg. (Tenn.) 525. But an attorney employed to manage a suit may, in the absence of his employer, engage assistant counsel, and such counsel may charge his fees to the attorney or his client. Otherwise, if the party, or his authorized agent, is present at the trial. *Briggs v. Georgia*, 10 Vt. 68.

Attorneys as partners. Where attorneys, who are copartners, accept a retainer, it is a joint contract, continuing to the termination of the suit, and neither can be released from the obligations they have assumed, so far as their clients are concerned, by a dissolution of their firm, or any other act or agreement between themselves. *Walker v. Goodrich*, 16 Ill. 841. They are equally responsible for moneys collected and not paid over, though one of them had no participation in that particular transaction. *Dwight v. Simon*, 4 La. Ann. 490. And where two attorneys are in partnership, and one receives money, demand on him is a demand on both, and renders both liable (*M'Furland v. Orary*, 8 Cow. 253); so, if one does the business of a client unskillfully, both are liable to him in damages. *Warner v. Griswold*, 8 Wend. 665; see *McGill v. McGill*, 2 Metc. (Ky.) 258; *Livingston v. Cox*, 6 Penn. St. 360.

Attorney's clerks. The clerk represents the attorney, during his absence, as to all ordinary business of the office (*Power v. Kent*, 1 Cow. 211); thus, an agreement made by the clerk, in the absence of his principal, waiving an irregularity, was held to be binding upon the latter. *Ib.*; *Sibley v. Waffle*, 16 N. Y. (2 Smith) 188. But an attorney's clerk, however extensive his general powers may be, cannot discontinue an action without the consent of his principal (*Irons v. Spring*, 35 How. 479; S. C., 7 Rob. 298); nor can he bind the attorney's client by a discharge, without satisfaction, of a debt due the client. *Carter v. Talcott*, 10 Vt. 471. Even the attorney has no authority to do so. *Ib.*

4. DUTIES, LIABILITIES, AND DISABILITIES:

Duty of attorney. The highest degree of fairness and good faith is required from an attorney, and the courts will closely scrutinize the dealings between attorneys and their clients, and will relieve the latter from any undue consequences resulting from them, whenever the good faith of the contract does not clearly appear. *Gray v. Emmons*, 7 Mich. 533; *Jennings v. McConnell*, 17 Ill. 148; *Starr v. Vanderheyden*, 9 Johns. 253; *Bbb v. Smith*, 1 Dana (Ky.), 582; *Mills v. Mills*, 26 Conn. 218. It is the duty of the attorney to disclose to his client every adverse retainer, and every prior retainer which may affect his judgment or his client's interest; but the concealment of the fact will not necessarily imply fraud. *Williams v. Reed*, 8 Mas. C. C. 405.

Skill. An attorney is bound to reasonable skill and diligence, and the skill has reference to the character of the business he undertakes to do. Reasonable skill constitutes the measure of his engagement, and he is responsible for ordinary neglect. *Wilson v. Russ*, 19 Me. 421; *O'Barr v. Alexander*, 37 Ga. 195; *Cox v. Sullivan*, 7 id. 144; *Holmes v. Peck*, 1 R. I. 242; *Stevens v. Walker*, 55 Ill. 151; *Bowman v. Tallman*, 27 How. 212; S. C., 40 id. 1; *Wright (Ohio)*, 466. See *Pennington v. Yell*, 11 Ark. 212; *Evans v. Watrous*, 2 Port. (Ala.) 205, where it is held that an attorney is liable only for gross negligence or gross ignorance in the performance of his professional duties.

Liabilities of attorney. Whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, the attorney is liable for the damages occasioned by such loss. *Gilbert v. Williams*, 8 Mass. 51; *Armstrong v. Craig*, 18 Barb. 387. So it is the duty of an attorney, who undertakes to collect a debt, to sue out all process necessary to the object; and if he neglects to do so, he is answerable to his client for the injury sustained by him. *Crooker v. Hutchinson*, 2 D. Chip. (Vt.) 117; *Oldham v. Sparks*, 28 Tex. 425; *Dearborn v. Dearborn*, 15 Mass. 316; *Eccles v. Stevenson*, 8 Bibb (Ky.), 517; *Reilly v. Cananough*, 29 Ind. 435; *Cox v. Sullivan*, 7 Ga. 44. An attorney is liable for losses sustained by his negligence, but the questions of negligence and injury are matters of fact for the jury (*Hogg v. Martin*.

Riley [S. C.], 156; and he is liable only to the extent of the injury his client has received. *Suydam v. Vance*, 2 McLean's C. C. 99.

An attorney is not bound to proceed in a cause unless his legal fees are tendered or secured to him, if he makes that request. *Castro v. Bennet*, 2 Johns. 296; *Gleason v. Clark*, 9 Cow. 57.

Disabilities. In Indiana an attorney may be surety for his client. *Church v. Drummond*, 7 Ind. 17; *Abbott v. Zeigler*, 9 id. 511. But in some of the States he is disqualified. See *Love v. Sheffelin*, 7 Fla. 40; *Massie v. Mann*, 17 Iowa, 181; *Gilbank v. Stephenson*, 90 Wis. 155; *Branger v. Buttrick*, id. 153. As to the rule in New York, see *Ryckman v. Coleman*, 13 Abb. 398; *Miles v. Clarke*, 4 Bosw. 632; *Walker v. Holmes*, 22 Wend. 614; in South Carolina, *Dillon v. Watkins*, 2 Spears, 445.

The attorney in a cause is not disqualified from being a witness (*Little v. McKeon*, 1 Sandf. 607; *Robinson v. Dauchy*, 3 Barb. 20; *Frear v. Drinker*, 8 Penn. St. 520; *Hall v. Renfro*, 3 Metc. [Ky.] 51); even though his judgment fee depends on his success (*Newman v. Bradley*, 1 Dall. 241), or he expects a larger fee if his client succeeds. *Boulden v. Hebel*, 17 Serg. & Rawle (Penn.), 812; *Miles v. O'Hara*, 1 id. 82; *Slocum v. Newby*, 1 Murph. (N. C.) 423. But the practice of an attorney testifying, or making affidavit for his client, is very objectionable. See *Little v. McKeon*, 1 Sandf. 607; *Spencer v. Kinnard*, 12 Tex. 180; *Stratton v. Henderson*, 26 Ill. 68.

It is irregular for one and the same attorney to appear for both parties in a suit (*Sherwood v. Saratoga, etc., R. R. Co.*, 15 Barb. 650); and where he has been retained by one party he cannot recover for professional services rendered in the same matter to the other. *Herrick v. Catley*, 30 How. 206; S. C., 1 Daly, 512. So an attorney is never allowed to change sides in the same cause, though at different trials. But when an attorney, in the course of other business, has obtained a knowledge of matters connected with the suit in question, he will not generally be prevented from acting against the party through whose business he obtained such knowledge. *Wilson v. State*, 16 Ind. 392; *Valentine v. Stewart*, 15 Cal. 387.

Under the Revised Statutes of New York it is made an offense for an attorney to purchase a chose in action for the purpose of suing upon it. 2 R. S. 288, §§ 71, 73. See, as to construction of statute, *Mann v. Fairchild*, 3 Abb. Ct. App. 152; *Brotherson v. Connalus*, 26 How. 218; *Van Rensselaer v. Sheriff*, 1 Cow. 443; *Baldwin v. Latson*, 2 Barb. Ch. 306.

Liability of attorney to third persons. A person injured by an attorney's appearing for him without authority has a remedy by action against the attorney. *Smith v. Bowditch*, 7 Pick. (Mass.) 188; *Coit v. Sheldon*, 1 Tyler (Vt.), 304; *Munnikuyson v. Dorsett*, 2 Har. & G. (Md.) 374. So, an action will lie against an attorney for maliciously suing out process. *Burnap v. Marsh*, 13 Ill. 535. An attorney and his client are both liable, if the attorney illegally issues a *fi. fa.* *Newberry v. Lea*, 3 Hill, 528.

But an attorney is not liable civilly for ordering a levy on property, if he acts in good faith and on reasonable cause. *Hunt v. Printup*, 28 Ga. 297. And see *Seaton v. Cordray*, Wright (Ohio), 102; *Ford v. Williams*, 24 N. Y. (10 Smith) 359; 13 N. Y. (3 Kern.) 577. To sustain an action against an attorney for acts done in the prosecution of his client's rights, it must be shown that such acts were malicious and without foundation. *Wigg v. Simonon*, 12 Rich. (S. C.) 583.

Where an attorney procures money to be advanced by a third person, in the prosecution of an action, without attempting to pledge the credit of his client therefor, the attorney alone is responsible to such third person. *Bell v. Mason*, 10 Vt. 509.

An attorney may also incur liability for costs, fees of officers, witnesses, etc. Thus, in Georgia, where an attorney institutes a suit for a plaintiff living out of the State, he is liable, if the suit is dismissed or the plaintiff cast, for all costs. *Carmichael v. Pendleton*, Dudley (Ga.), 173. And in New York, an attorney is liable for costs to the amount of \$100, when he proceeds in a suit after the removal of his client from the State, whether the costs accrued before or after such removal (*Wright v. Black*, 2 Wend. 253; see *Boyce v. Bates*, 8 How. 495); so, where one is made lessor in ejectment without his authority, the plaintiff's attorney, and not he, is liable for the costs (*People v. Bradt*, 6 Johns. 318); and the costs of an irregularity arising from the gross ignorance or negligence of the attorney will be charged upon him personally (*Kane v. Van Vranken*, 5 Paige, 62; *Ex parte Robbins*, 63 N. C. 309; see *Cushman v. Brown*, 6 Paige, 539; *Powell v. Kane*, 5 id. 260; 2 Edw. 450); so courts have the right to punish gross violations of decency and decorum on the part of

an attorney, by taxing him with the costs of the cause. *Brown v. Brown*, 4 Ind. 627; *Love-land v. Jones*, id. 184.

An attorney is liable to the sheriff for fees on process delivered to him for execution. *Birkbeck v. Stafford*, 28 How. 236; S. C., 14 Abb. 285; see *Touls v. Hatch*, 43 N. H. 270. But he is not liable for the fees of a witness summoned to testify for his client, unless upon a special promise to pay them. *Sargeant v. Pettibone*, 1 Aik. (Vt.) 355.

5. *Compensation and lien of.* The doctrine of the common law, that counsel fees are merely honorary, and that a counselor cannot sustain a suit for his fees, is not recognized in American practice, excepting in one State — that of New Jersey. See *Seeley v. Crane*, 3 Green (N. J.), 85. With us, the prevalent doctrine is, that the relation between the attorney and his client is created by contract, and, like all other contracts, may be enforced in a court of law. *Stevens v. Adams*, 23 Wend. 57; S. C., 26 id. 451; *Poster v. Jack*, 4 Watts (Penn.), 334; *Balsbaugh v. Frazer*, 19 Penn. St. 95; *Carter v. Bennett*, 6 Fla. 214; *Webb v. Browning*, 14 Mo. 354; *Casey v. March*, 30 Tex. 180; *Clendinen v. Black*, 9 Bailey (S. C.), 488; *Rust v. Larue*, 4 Litt. (Ky.) 411; *In re Paschal*, 10 Wall. (U. S.) 483. But an attorney cannot recover for professional services, unless he can show that he has been employed as such (*Cooly v. Cecile*, 8 La. Ann. 51; *Roselins v. Delachaise*, 5 id. 432; *Michon v. Gravier*, 11 id. 596; *Chicago, etc., R. R. Co. v. Larned*, 26 Ill. 218); or he must at least show some recognition of him, by his client, as attorney, in the progress of the suit. *Hotchkins v. Le Roy*, 9 Johns. 142; *Burghart v. Gardiner*, 3 Barb. 64. So, an attorney cannot recover for services which, through his own neglect, proved to be of no value to his client (*Nixon v. Phelps*, 29 Vt. 198; *Bowman v. Tallman*, 40 How. 1); nor is he entitled to compensation for services, when he detains money collected, until he is sued for it. *Bredin v. Kingland*, 4 Watts (Penn.), 420.

In the absence of an express contract as to price, an attorney is entitled to recover for his services what they were reasonably worth. *Smith v. Davis*, 45 N. H. 566; *Webb v. Browning*, 14 Mo. 353; *Garr v. Mairat*, 1 Hilt. 496; *Hadley v. Ayres*, 12 Abb. N. S. 240. Opinions of attorneys may be received in proof of the value of the services rendered (*Edelin v. Richardson*, 4 La. Ann. 358; *Garfield v. Kirk*, 65 Barb. 464), and the value of the property involved in the suit may be taken into view. *Ib.*

The following agreements between attorneys and their clients have been held to be valid: An agreement after judgment recovered, that the attorney shall have part of the judgment, when collected (*Floyd v. Goodwin*, 8 Yerg. [Tenn.] 484); that the attorney shall be first paid out of the funds recovered (*Christie v. Sawyer*, 44 N. H. 296); that the costs to be recovered in the suit shall belong to the attorney (*Ely v. Cooke*, 28 N. Y. [1 Tiff.] 965); that the attorney shall have a percentage on the amount recovered in the suit. *Ryan v. Martin*, 18 Wis. 672; *White v. Roberts*, 4 Dana (Ky.), 172; *Tapley v. Coffin*, 12 Gray (Mass.), 420; *Bayard v. McLane*, 3 Harr. (Del.) 139; *Ex parte Pitt*, 2 Wall. Jr. 453; *Ogden v. Des Arts*, 4 Duer, 275; see *McDonald v. Chicago, etc., R. R. Co.*, 29 Iowa, 170. But see, *contra*, *Satterlee v. Frazer*, 9 Sandf. 141; *Boardman v. Thompson*, 25 Iowa, 487; *Holloway v. Lowe*, 7 Port. (Ala.) 488; *Morgan v. Driggs*, 8 La. Ann. 124; *Elliott v. McClelland*, 17 Ala. 206. So an agreement by an attorney to commence and conduct and pay all the expenses of a suit, and give the plaintiff a certain share of the proceeds, is held valid (*Fogarty v. Jordan*, 2 Robt. 319); and so of a parol assignment of a cause, by a plaintiff to his attorney, in consideration of the attorney's former services and advancements. *Jorden v. Gillen*, 44 N. H. 424.

Where an attorney is retained to conduct a proceeding to its termination, the statute of limitations does not begin to run against his claim for services and disbursements until the proceeding is terminated (*Mygatt v. Wilcox*, 45 N. Y. [6 Hand] 306); but where the attorney's services are rendered in reference to a particular matter, and he is called upon for no further service, his cause of action arises immediately, and the statute then begins to run. *Adams v. Mott*, 44 Vt. 259.

Attorney's lien. As it regards the attorney's lien, it may be stated as a general rule, that where he is employed to prosecute a demand, he has a lien upon any judgment or recovery obtained through his services, for the fees or compensation due him therefor; and the courts will take care to protect this lien, against any unfair dealings by the client with the right of action, or the judgment. *Martin v. Hawks*, 15 Johns. 405; *Walker v. Sargeant*, 14 Vt. 247; *Andrews v. Morse*, 12 Conn. 444; *Carter v. Davis*, 8 Fla. 183; *Currier v. Boston, etc., R. R. Co.*, 37 N. H. 223; *Stewart v. Flowers*, 44 Miss. 518; *Marshall v. Meech*, 51 N. Y. (6 Sick.) 140; *Pulver v. Harris*, 52 N. Y. (7 Sick.) 73. The attorney's lien likewise attaches

upon papers and writings of his client, including deeds, leases, etc.; also upon money, notes deposited for collection, a fund or estate (*Stewart v. Flowers*, 44 Miss. 513; *Howard v. Osceola*, 22 Wis. 453; *Dennett v. Cutts*, 11 N. H. 163); or upon a bond and mortgage in his hands for foreclosure. *Bowling Green Savings Bank v. Todd*, 52 N. Y. (7 Sick.) 489.

The lien of the attorney does not arise until judgment. The parties may settle the suit before judgment, and give releases, without reference to any claims of attorneys for services previously rendered. *Getchell v. Clark*, 5 Mass. 309; *Potter v. Mayo*, 3 Me. 84; *Sweet v. Bartlett*, 4 Sandf. 661; *Foot v. Tewksbury*, 2 Vt. 97. But a collusive agreement between the parties, to settle the suit in fraud of an attorney, will not be enforced. *Heister v. Den*, 17 N. J. L. (2 Harr.) 488.

In some of the States an attorney has a lien only by statute. See, as to Maine, *Potter v. Mayo*, 3 Me. 84; Massachusetts, *Baker v. Cook*, 11 Mass. 236. In New York the Code of Procedure has not abrogated the attorney's lien (*Rooney v. Second Ave. R. R. Co.*, 18 N. Y. [4 Smith] 368); and it exists not only to the extent of the costs entered in the judgment, but for any sum which the client agreed his attorney should have as a compensation for his services. *Marshall v. Meech*, 51 N. Y. (6 Sick.) 140; 10 Am. Rep. 572.

6. *Remedies of clients against attorneys.* The usual remedy of the client against an attorney for inattention, negligence, or unskillfulness, is by action. Thus, an attorney is liable in an action at law, for blunders and omissions in the conduct of the formal proceedings whereby his client is prejudiced (*Evans v. Watrous*, 2 Port. [Ala.] 205; *Benton v. Craig*, 2 Miss. 198; *Anonymous*, 1 Wend. 108; *Gaillar v. Smart*, 6 Cow. 385; *Cox v. Livingston*, 2 Watts & Serg. [Penn.] 108; *Fitch v. Scott*, 3 How. [Miss.] 314; *Stephens v. White*, 2 Wash. [Va.] 208; *Dearborn v. Dearborn*, 15 Mass. 816; *Crooker v. Hutchinson*, 2 D. Chip. [Vt.] 117); but in cases of negligence he is liable only to the extent of the injury his client has received. *Suydam v. Vance*, 2 McLean's C. C. 99; *Hogg v. Martin*, Riley (S. C.), 156; *Grayson v. Wilkinson*, 13 Miss. (5 Smedes & Marsh.) 268; *Eccles v. Stephenson*, 3 Bibb (Ky.), 517.

An attorney is liable to an action for money collected by him and not paid over to his client; but such action cannot be maintained except upon averment and proof of a demand on the attorney, or such circumstances as dispense therewith. *People v. Brotherson*, 36 Barb. 662; *Walradt v. Maynard*, 3 id. 584; *Beardsley v. Boyd*, 37 Me. 180; *Black v. Hersch*, 18 Ind. 842; *Krance v. Dorrances*, 10 Penn. St. 462. So an attorney may be compelled to pay over money upon a summary application to the court (*Hess v. Joseph*, 7 Robt. 609; *Saxton v. Wyckoff*, 6 Paige, 182; *Mcpritt v. Lambert*, 10 id. 352; *Hynman v. Washington*, 2 M'Cord (S. C.), 493; *People v. Smith*, 3 Caines, 221); and attorneys are amenable also to the summary jurisdiction of the courts for malpractice in the discharge of their duties generally, or for general misconduct. *Starr v. Vanderheyden*, 9 Johns. 253; *Brotherson v. Consalus*, 26 How. 213.

7. *Privileged communications.* All communications made by a client to his counsel, for the purposes of professional advice or assistance, are privileged, whether such advice relates to a suit pending, one contemplated, or to any other matter proper for such advice or aid. *Yordon v. Hess*, 13 Johns. 492; *Riley v. Johnston*, 13 Ga. 260; *King v. Barrett*, 11 Ohio St. 261; *Holmes v. Barbin*, 15 La. Ann. 553; *McClellan v. Longfellow*, 83 Me. 494; *Parker v. Carter*, 4 Munt. (Va.) 273; *Cross v. Riggins*, 50 Mo. 335; *Carnes v. Platt*, 15 Abb. N. S. 387. But where the communications are made in the presence of all the parties to the controversy, they are not privileged, and the evidence is competent between such parties. *Carr v. Weld*, 15 N. J. L. (3 Green) 314; *Dunn v. Amos*, 14 Wis. 106; *Whiting v. Barney*, 30 N. Y. (3 Tiff.) 890; *Britton v. Lorentz*, 45 N. Y. (6 Hand) 51; *Rice v. Rice*, 14 B. Monr. (Ky.) 417.

The willingness of the attorney to divulge the privileged communications is not enough to warrant receiving them (*Chirac v. Reinicker*, 11 Wheat. 280, 294; *Jenkinson v. State*, 5 Blackf. [Ind.] 465); and the privilege is not affected by the fact that no fee was asked or expected (*Hunter v. Van Bomhorst*, 1 Md. 604; *March v. Ludlum*, 3 Sandf. Ch. 85; *McManners v. State*, 2 Head [Tenn.], 213); so, the privilege is held to extend to an attorney employed to draw a deed; and to an interpreter employed to translate between the attorney and the client (*Linthicum v. Remington*, 5 Cranch's C. C. 546; *Parker v. Carter*, 4 Munt. [Va.] 273; but see *De Wolf v. Strader*, 26 Ill. 225; *Borum v. Fouts*, 15 Ind. 50; *Hatton v. Robinson*, 14 Pick. [Mass.] 416; *Randel v. Yates*, 48 Miss. 685); and it extends to a communication made by a client to an attorney's clerk (*Landsberger v. Gorham*, 5 Cal. 450; *Sibley v. Waffle*, 16 N. Y. [2 Smith] 180); but the rule does not extend to conveyancers (*Muthew's Estate*, 1 Phil.

[Penn.] 292; nor to a student at law because studying in an attorney's office, or under his direction (*Holman v. Kimball*, 22 Vt. 555; *Barnes v. Harris*, 7 Cush. [Mass.] 576; *Andrews v. Solomon*, Pet. C. C. 356); and the attorney may be required to disclose facts which he learned from other sources than his client (*Bogert v. Bogert*, 2 Edw. 399; *Hunter v. Watson*, 12 Cal. 363; *Rogers v. Dare*, Wright [Ohio], 136; *Chirac v. Reinicker*, 11 Wheat. 280); so, he is bound to testify, like any other witness, to statements made by the client to other persons, or by other persons to the client, or to each other in his presence (*Gallagher v. Williamson*, 23 Cal. 331); and he is not privileged as a witness from communicating facts concerning his client, when he himself is a party to the transaction. *Jeanes v. Fridenberg*, 8 Penn. Law Jour. Rep. 199.

Production of documents. An attorney or counsel, who, as such, has been intrusted with papers or documents, is not bound to produce them in evidence on the call of the opposite party, or of a third person (*Kellogg v. Kellogg*, 6 Barb. 116; *Jackson v. Burtis*, 14 Johns. 391; *Durkee v. Leland*, 4 Vt. 612; *Lynde v. Judd*, 3 Day [Conn.], 499), though he may be called on to prove the existence of papers, and that they are in his possession, in order to enable secondary evidence to be given of their contents. *Jackson v. M'Vey*, 18 Johns. 330; *Brandt v. Klein*, 17 id. 335; *Rhodes v. Selin*, 4 Wash. C. C. 718. And it has been held that papers, intrusted to an attorney in professional confidence, are not necessarily to be deemed confidential communications (*Mitchell's Case*, 12 Abb. 249), and their production can be resisted only when a controversy exists, or is anticipated between parties, in relation to the subject on which communications were made to the attorney, on the documents intrusted to him. *Peck v. Williams*, 13 Abb. 68.

Privilege, how waived. The privilege is the privilege of the client, and may be waived by him; hence, when the client calls upon the attorney to testify or his consent is shown, the latter may be required to do so (*Riddles v. Aikin*, 29 Me. 453; *Benjamin v. Coventry*, 19 Wend. 353; *Fosser v. Schriber*, 38 Ill. 172); and where the plaintiff examines his attorney as a witness, he waives his privilege, and upon a cross-examination, the attorney is bound to answer generally. *Crittenden v. Strother*, 2 Cranch's C. C. 464. See *Mitchell's Case*, 12 Abb. 249; *King v. Barrett*, 11 Ohio St. 261.

If, after the relation of attorney and client has ceased, the former client voluntarily repeats communications previously made during the subsistence of the relation, the attorney is a competent witness as to such subsequent communications. *Yordon v. Hess*, 13 Johns. 492. So the privilege ceases after the death of the client, where the solicitor has been made his executor and residuary legatee. *Crosby v. Berger*, 4 Edw. 254; S. C., 11 Paige, 377.

What disclosures allowed. An attorney may be required to disclose by whom he was employed (*Martin v. Anderson*, 21 Ga. 301; *Brown v. Payson*, 6 N. H. 443; *Satterlee v. Bliss*, 86 Cal. 489; *Gower v. Emery*, 18 Me. 79); and he may disclose terms of compromise offered by him to his client's creditors (*M'Twish v. Dunning*, Anth. 82; id. 118); and he may be examined as to the handwriting of his client, if a knowledge thereof is acquired without any communication from him. *Johnson v. Davenport*, 19 Johns. 134. So an attorney who draws up a will is competent to testify as to its contents, in order to set it up as a lost will (*Graham v. O'Fallon*, 4 Mo. 338); and he may be required to disclose collateral facts, as that a bond was lodged with the client, by way of indemnity; or, that he expressed himself satisfied with a certain security. *Heister v. Davis*, 3 Yeates (Penn.), 4.

Where the attorney and client both engage in committing a wrongful act, the former cannot refuse to disclose the facts of the transaction on the ground that his knowledge thereof resulted from the relationship of attorney and client. *Dudley v. Beck*, 3 Wis. 374.

Liability for words spoken. An attorney, in the discussion of his client's cause, is not liable for words spoken or written relative to the matters in controversy, or subjects which incidentally arise in the course of the trial; and no action will lie for such speaking or writing, however false, defamatory, or malicious may be the words, provided the matter was material to the issue or inquiry before the court. *Newfield v. Copperman*, 15 Abb. N. S. 360; *Marsh v. Ellsworth*, 36 How. 532; 1 Sweeny, 52; *Garr v. Selden*, 4 N. Y. (4 Comst.) 91; *Commonwealth v. Culver*, 1 Penn. Law Jour. Rep. 361. But if an attorney wantonly departs from the evidence and point in issue, with an intent to injure the character of the adversary or that of others, without propriety or probable ground, he is responsible. Id.; *Marsh v. Ellsworth*, 50 N. Y. (5 Sick.) 309; *Ring v. Wheeler*, 7 Cow. 725; *Hastings v. Lusk*, 22 Wend. 410; *Gilbert v. The People*, 1 Denio, 41.

A counsel accordingly is to be considered not as making a contract with his client, which he is incapacitated from doing (*b*), but as taking upon himself an office or duty in the proper discharge of which not merely his client, but the court in which the duty is to be performed, and the public at large have an interest. The general conduct of, and control over, the cause are necessarily left to counsel, and he has complete authority over the suit, the mode of conducting it, and all that is incident to it; but not over matters collateral thereto (*c*). Moreover, in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men (a few of whom may sometimes insinuate themselves even into the most honourable professions), it has been held that a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless: but if he maliciously mentions an untruth of his own invention, not pertinent to the cause, he may be liable to an action at suit of the party injured (*d*).

[* 26] * Having thus briefly adverted to courts in general, we are next to consider the several species of courts by which justice is civilly administered in this country — the jurisdiction of each respectively, and the procedure appropriated therein for the redress of grievances.

(*b*) Judgm. *Kennedy v. Brown*, 18 C. B., N. S. 736.

(*c*) *Swinsfen v. Lord Chelmsford*, 5 H. & N. 890; *Strauss v. Francis*, 1 L. R., Q. B. 379.

(*d*) *Hodgson v. Scarlett*, 1 B. & Ald. 232. So, if the counsel intentionally did a wrong or acted with fraud or trickery, he might incur liability; Judgm. 5 H. & N. 919.

3. *Disbarring.* Attorneys are liable in some cases of gross misconduct to have their names stricken from the roll, as where it satisfactorily appears that no reliance can be placed upon the word or oath of the attorney (*Matter of Percy*, 36 N. Y. [9 Tiff.] 651); or he has been convicted of subornation of perjury (*State v. Holding*, 1 McCord [S. C.] 379); or has made a false oath or professional statement, without a conviction for perjury. *Perry v. State*, 3 Iowa, 550. So it has been held good cause for disbaring an attorney, that he accepted a challenge to fight a duel, or that he fought a duel in a sister State, and killed his antagonist (*Smith v. State*, 1 Yerg. [Tenn.] 228); so for obtaining money by false representations relative to matters intrusted to him in that capacity (*People v. Ford*, 54 Ill. 520), and for an attempt to make an opposing attorney drunk, to obtain an advantage over him in the trial of a cause. *Dickens' Case*, 67 Penn. St. 169. But discreditable acts, if not infamous and not connected with an attorney's duties, will not give the court jurisdiction to strike him from the roll. *Ib.*

A threat of personal chastisement, made by an attorney to a judge out of court for his conduct during the trial of a cause pending, is good ground for striking off the attorney from the roll. *Bradley v. Fisher*, 18 Wall. 335; see *Saxton v. Stowell*, 11 Paige, 526; *Beene v. State*, 23 Ark. 149; *Ex parte Heyfron*, 8 Miss. (7 How.) 127. But a letter written by an attorney to a judge, telling him in respectful language that the court had lost the confidence of the public, and suggesting his retirement as the means of restoring it, is not sufficient ground for striking the attorney from the roll. *Austin's Case*, 5 Rawle (Penn.), 191.

It is held that proceedings to disbar an attorney, while not strictly a criminal prosecution are of that nature; and the charges preferred should be clearly supported by the evidence to warrant a conviction. *Matter of Baluss*, 28 Mich. (6 Post.) 507. See *People v. Harvey*, 41 Ill. 277; *Rice v. Commonwealth*, 13 B. Monr. (Ky.) 473; *Anonymous*, 23 Wend. 656.

* CHAPTER IV.

[* 27]

THE COURT OF CHANCERY.

THE name of chancery, (443) *cancellaria*, and of the judge who presides there, the Lord Chancellor, or *Cancellarius*, is derived, according to sir Edward Coke, and other ancient authorities (a), from *cancello*, because the highest exercise of his office is to cancel the king's letters patent when granted contrary to law, a patent or other record being vacated by drawing cross lines lattice-wise (*cancelli*, or cross bars) across it (b).

Chancery.
Derivation of
the word.

- (a) 4 Inst. 88; Lambard Archeion. 46. 1 Campb. Lives of the Chancellors, ii. as to
(b) See also Gibb. Decl. & Fall. ii. 99; and the various derivations ascribed to the name.

(443) The American system of jurisprudence is so largely drawn from, and founded upon, that of England, that there will be found a most remarkable agreement in the fundamental rules of law, and of the principles of equity. Not only are the general rules and principles the same in both systems, but there has been, and in some of the States there still is, a very general harmony as to the practice in courts of equity, and the general rules of English equity practice are now in daily use in many of the States of the Union.

But at the present time there is a strong tendency toward a change in the mere rules of practice in all the courts; and, while the rules of law and the principles of equity are mainly left untouched, there are several of the States which have attempted to blend or unite the two systems of law and of equity into one uniform system of practice, adapted to the administration of legal and equitable principles by one and the same court.

The New York Code of Procedure was framed upon the theory that legal rules and equitable principles could be as well administered by one court as by two separate courts having separate and distinct organizations and jurisdictions. This Code has been adopted wholly or partially in several of the States, and, for that reason, it may be proper to notice briefly some of the results of the system.

Mode of uniting the two systems. Under the English system, courts of law and courts of equity are separate and distinct organizations, each of which administers the rules of law, or the principles of equity, according to a long-established practice.

The general adoption of this system in many of the States of the Union is familiar to every student. In this State (N. Y.) there were formerly courts of law, and also a court of chancery, both of which had existed from an early period, and they continued to exist down to the year 1846.

By the constitution of 1846, it was provided by article 6, section 8: "There shall be a supreme court having general jurisdiction in law and equity." In accordance with this provision, the legislature enacted a law, declaring that the supreme court, organized under this constitution, should have the same powers and exercise the same jurisdiction as that possessed and exercised by the supreme court or the court of chancery of this State. Laws 1847, ch. 280, § 16.

By section 69 (62) of the Code, the distinction between actions at law and suits in equity, and all the forms of such actions or suits, were abolished; and but one form of civil action, for the enforcement or protection of private rights, or the redress of private wrongs, was recognized.

The object of these changes was, to obviate many of the inconveniences arising from a double system of practice, and also to simplify the proceedings in all the courts.

The principles of the common law were generally plain, simple, few in number, and unbending in many instances to suit the exigencies of the particular case to be decided. The result was sometimes inconvenient, if not unjust, and for this reason the court of chancery was established for the purpose of softening the rigor of the common law, and for doing complete justice by means of forms of proceeding peculiar to itself. But even this system

The office and name of chancellor (however derived) was certainly known to the Roman emperors, with whom it originally seems to have signified a chief scribe or secretary, who was afterwards an officer, to whose functions there were gradually added several judicial powers, together with a general superintendency over the other officers of the prince.

Office of Lord
Chancellor, and
its history.

of double court, with separate forms of proceeding, did not prevent the existence of some inconveniences; and, for the purpose of securing all the advantages, and avoiding all the inconveniences of the former systems, the present system of blending law and equity practice was adopted in this State. In another part of this work an outline of the former systems will be given, before proceeding to explain the details of the present system of practice.

Principles of law and equity unchanged. It will be remembered that the matters under consideration relate to the practice of the courts, and not to the general rules of law, nor to the principles of equity, by which rights are to be decided, or wrongs redressed. The rules of law will remain unchanged, whether they are enforced by a court having nothing but a common-law jurisdiction, or by a court of equity, or by a court exercising both a legal and an equitable jurisdiction.

"Although the Code has abolished all distinctions between the mere forms of action, and every action is now in form a special action on the case, yet actions vary in their nature, and there are intrinsic differences between them which no law can abolish. It is impossible to make an action for a direct aggression upon the plaintiff's rights, by taking and disposing of his property, the same thing, in substance or in principle, as an action to recover for the consequential injury resulting from an improper interference with the property of another, in which he has a contingent or prospective interest. The mere formal differences between such actions are abolished. The substantial differences remain as before. The same proof, therefore, is required in each of these same kind of actions as before the Code, and the same rule of damages applies. Hence, in an action in which the plaintiff establishes a right to recover, upon the ground that the defendant has wrongfully converted property, to the possession of which the plaintiff was entitled at the time of the conversion, the proper measure of damages still is the value of the property; while in an action in which the plaintiff recovers, if at all, upon the ground that the defendant has so conducted himself, in the exercise of a legal right in respect to another's property, as unnecessarily and improperly to reduce the value of a lien, which the plaintiff could only enforce at some subsequent day, the damages must, of course, depend upon the extent to which that lien has been impaired." *Goulet v. Asseler*, 22 N. Y. (8 Smith) 228, 229, SELDEN, J.

The union of two systems of law and equity practice has not enlarged, nor has it diminished, the powers of the new court, either as to legal or equitable jurisdiction; in relation to the rights which they may declare; or the remedies which they may enforce. And where an injunction could not have been granted under the former practice by the old court of chancery, it cannot now be granted by the new court, because the equitable jurisdiction of the courts is not enlarged by the union of legal and equitable powers in one court, nor by the provisions of the Code. *New York Life Ins. Co. v. Supervisors of New York*, 4 Duer, 192; 1 Abb. 250. And see, also, as to the powers of the court, *Hubbell v. Sibley*, 50 N. Y. (5 Sick.) 468, 472; *Matthews v. McPherson*, 65 N. C. 189; *Troost v. Davis*, 31 Ind. 34, 39; *Mordecai v. Stewart*, 37 Ga. 364; *Irick v. Black*, 17 N. J. Eq. (3 C. E. Green) 189.

An action of trover could not have been maintained under the former practice without proof of an unlawful detention or a conversion of the property; and under the Code this proof is equally essential. *Eldridge v. Adams*, 54 Barb. 417. See *Goulet v. Asseler*, 22 N. Y. (8 Smith) 225. Although the Code abolished the forms of actions, yet the principles by which the former actions were governed still remain, and control as much now as formerly in determining the rights of parties. *Ib.*

The abrogation of the distinction between actions at law and suits in equity, by enacting that there should be but one form of action, which should be called "a civil action," did not obliterate the distinction between the two sorts of proceedings, so far as the federal courts are concerned. *Thompson v. Railroad Companies*, 6 Wall. 134; *Walker v. Deville*, 12 id. 440-442, note. And, if a civil action is brought in a State court, and it is essentially

The Roman Church adopted, amongst other accessories of imperial state, this office, and hence every bishop has to this day his chancellor, the principal judge of his consistory court. When the modern kingdoms of Europe were

a common-law action, then the common-law form, and not an equitable one, must be pursued if the case is removed into a federal court. *Ib.* An action in a common-law form cannot be prosecuted in a State court up to the removal of the cause to a federal court, and then have the form of the action changed into that of a suit in equity. *Ib.* If the original form of the action was in accordance with the practice of the State courts, no change will be necessary on the removal of the cause, as the federal courts will, in such cases, adopt and apply the practice of the State courts. *Ib.* But this adoption of the State practice is not to be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. *Ib.*

Joinder of actions, whether legal or equitable. Under the former system, a party sometimes erred in the choice of a court in which to obtain a remedy, and the result was delay and expense, if no other loss ensued. A party who instituted a suit in equity, when his remedy was at law, was turned out of that court to begin again; and the same was true, when an action was brought at law in a case where equity afforded the only relief. As the courts are now organized, where the same judge presides in all cases presented for adjudication, no one can be turned out of the supreme court upon the ground that his action was commenced in the wrong courts. But, before noticing what causes of action may be joined, it ought to be mentioned that the rules of law and the principles of equity have not been changed or blended, even when legal and equitable remedies are both sought in a single action. Formerly, an action at law and a suit in equity were both essential, in some cases, if full justice was done to both parties. By the present system, it is intended that one action shall attain the same result, with less delay, expense or difficulty than under the old practice. The former courts of law and the old court of chancery each had a separate jurisdiction, and each had a system of practice which differed materially from that of the other. The present system adopts the same practice for all classes of actions, or of remedies, so far as that result is practicable. And, in reference to the mode of commencing actions; the general mode of pleading; the practice on the trial; the mode of entering judgments and of enforcing them, and even the remedy by appeal, there is much that is alike, and where there is a difference, it is in those matters which are required by the nature of the action. But, while many of the proceedings and forms will be the same, whether the remedy sought be legal or equitable, there will be some proceedings and forms required in some classes of actions, which would not be appropriate in, nor would they be adapted to, the other. The same judge may hear an action at law or a suit in equity, and either action may be commenced by a summons; but, even in such a case, there will be some difference in the form of the summons. Again, an action upon a promissory note may require many proceedings, which are essentially like those in a suit in equity, for the adjustment of complicated equities; but yet there are, and there always must be, differences in the mode of conducting these actions. And it will be found, on a careful examination, that, except in the uniformity of general proceedings already mentioned, the courts adopt the equity practice in equitable suits and proceedings, and those of the common-law practice in actions at law. In most actions of a legal nature the issues are few and simple, and readily disposed of by a jury; but, in an intricate equity suit, there are many matters which no jury could possibly dispose of in a proper manner. In such cases, the practice in each action must be such as is appropriate under the circumstances; and, while pursuing such a mode, it does not interfere with the aforesaid principle that the practice in actions at law and in suits in equity have, so far as practicable, been united. The object in blending them was to secure as great uniformity as was attainable, but it was not considered any less important to retain all the advantages of both systems, and to use them whenever the ends of justice and the objects of the law would be best subserved. Uniformity in the practice is not to be limited to an attempt to reduce every kind of action to one form of proceeding, nor will it be secured by applying the same rules of proceeding in every case. In equitable actions there are, in nearly all cases, many steps to be taken which would not be proper in an action at law, and yet they are indispensable in equity proceedings. This difference does not in any manner interfere with the general rules of practice, which are

established upon the ruins of the empire, almost every state preserved its chancellor, but the jurisdictions and dignities varied in the different states according to their several constitutions. In all of them he seems to have had the supervision of charters, letters, and such other public instruments of the [* 28] crown as were * authenticated in the most solemn manner; when, therefore, the use of seals was adopted, in or about the time of Edward the Confessor (*c*), the custody of the king's great seal was naturally entrusted to the chancellor, and with him it has ever since remained (*d*). In the present day, the office of Lord Chancellor is created by the mere delivery of the great seal into his custody; he thereby becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedency to every temporal lord, except the king's sons, brothers, nephews, and uncles (*e*). He is invariably made a privy councillor, if not so previously (*f*); he is *virtute officii* prolocutor, or mouthpiece of the House of Lords, whether a peer or not (*g*), presiding as well over its legislative as its judicial sittings. To him belongs the appointment of all justices of the peace throughout the kingdom.

Being, in early times, usually an ecclesiastic (for none else were then capable

(*c*) See *ante*, vol. ii.

(*d*) It used to be said, that one Rembaldus who was called chancellor of Edward the Confessor, was the first in England who received that appellation (Ellesmere, Office of Chancellor, p. 12); but duties analogous to those of Edward's chancellor were certainly performed by a great officer or secretary of the king, whether called chancellor or not, in very much earlier times. See 1 Lord Campbell's Lives of the Chancellors, p. 8.

(*e*) Stat. 31 Hen. 8, c. 10.

(*f*) Selden (Office of Lord Chancellor, § 3) says that he is a privy councillor *virtute officii*; but see 1 Campb. Lives of the Chancellors, p. 16.

(*g*) Lord Ellesmere's Office of Lord Chancellor. Gilb. w. 42. If the lord chancellor be not a peer, he, although still president of the House of Lords, is not entitled to address the house or vote.

equally applicable to either class of actions. Consistency in relation to joining actions at law and suits in equity does not require that the practice should be uniform in all particulars, for that is plainly impracticable. When as great uniformity as is practicable is attained, all the advantages of blending the two systems will have been secured. And the next important step will be to adopt a uniform and harmonious practice in relation to each class of actions, whether legal or equitable. And it is just here that some of the most perplexing questions have arisen. The present practice is much of it founded upon statutes, and the difference of opinion among judges in construing them has been greatly increased by the large number of judges who have decided the various questions as they arose in the course of actions. Material differences in the minds of the judges, and of their various modes of study and practice, in addition to the fact that many cases were decided without the aid of previous decisions, which were not then reported, have all tended to increase the number of contradictory adjudications. These inconveniences had, however, some corresponding advantages; for, if each judge had decided all his cases without the aid of previous decisions, there would remain the advantage of his own unbiased judgment, acting independently of authority, and thus securing the reasoning of a strong mind after a thorough examination of the case. Conflicting decisions upon the same question are a serious inconvenience in the practice, and they have been somewhat the cause of incongruities in the practice. But much of this evil may now be avoided, for it may be safely said, that most of the difficult questions in the practice are now settled by a clear current of authority.

In some instances the true rule is so well settled that no one would question what the rule is. In other cases, there may be a conflict in the authorities, but even these cases are less numerous than one might imagine on a first thought; and, after a careful examination of all the authorities and the statutes, the true rule may be discovered, and a harmonious system laid down for the convenience of the student, the profession and the courts.

of an office involving much knowledge of letters), and presiding over the royal chapel (*h*), he became, and is still, in a legal point of view, keeper of the king's conscience. He is also visitor, in right of the king, of all hospitals and colleges of the king's foundation. He also exercises the right of patronage of all *livings of the king that are of small value; this patronage, in [*29] early times, extended to all of the king's livings whose annual value was 20 marks or under, and was chiefly exercised in favour of the clerks in chancery, who were usually ecclesiastics (*i*): afterwards, the right of presentation, without any restriction, was assumed by the chancellors, and livings up to the value of 20*l*. in the king's book (*j*) were included in this right, which has continued to the present day; the livings being in fact now looked upon and dealt with, even by the legislature, as if the advowsons were vested in the Lord Chancellor as a corporation.

The Lord Chancellor is, by the jurisdiction inherent in his office, the general guardian of all infants, idiots, and lunatics (*k*), and has the general superintendence of all charitable foundations (*l*). The duties arising from this position of guardianship and superintendence are now shared by other judges, and, moreover, have, by recent legislature, been lessened by the establishment of other functionaries (*m*).

* In addition to all these functions, the Lord Chancellor is the chief [*30] judge in the Court of Chancery, wherein there are two courts; the one ordinary, being a court of common law, the other extraordinary, being a court of equity (*n*). Though the Court of Chancery, in the most ancient times, was a court of record, for letters patent under the great seal were, and are always, recorded in the court (*o*), it was not originally a court where justice was administered; but from the very earliest times, out of the Court of Chancery, which has from this circumstance been called *officina brevium* and *officina justitiæ*, there have issued writs under the great seal directed to the king's jus-

The Court of Chancery a court of record for letters patent, &c.

Officina brevium.

(*h*) Madox, Hist. of Exch. 42; 1 Campbell's Lives of the Chancellors, 4.

(*i*) See Christian's note to his edition of Blackstone's Commentaries, vol. iii. p. 48, n. 6. In order to make provision for the augmentation of the value of the chancellor's livings, an act has been recently passed to authorize the lord chancellor to sell the advowsons of certain livings, the price being applied in increasing their value. See the Lord Chancellor's Augmentation Act, 26 & 27 Vict. c. 120, under which a large number of the very small livings, the advowsons of which were vested in the lord chancellor, have passed into private hands.

(*j*) *I. a.*, the valuation made in the time of Henry VIII., under 26 Hen. 8, c. 3.

(*k*) A warrant under the sign manual committing the care of idiots and lunatics to the chancellor is usually given to him on his receiving the great seal, but it would seem that the jurisdiction is inherent in the office. See Campbell's Lives, 15. Some further information on the custody of idiots and lunatics and their property will be found in the next chapter.

(*l*) By 52 Geo. 3, c. 101, summary means

for taking advantage of the control of the Court of Chancery have been provided. See *post*, p. 81.

(*m*) The Charity Commissioners, under 16 & 17 Vict. c. 137, now exercise a large control over endowed charities. As to what are endowed charities within their jurisdiction, see *Governors of the Charity for the Relief of Clergymen's Widows v. Sutton*, 27 Beav. 651.

(*n*) In old times often called the Latin and the English sides of the court, from the languages employed in the pleadings respectively used. The bill in the equity side long continued to be called the English bill.

(*o*) "A patent is a record in chancery upon which a *scire facias* may issue, and it is a sufficient record whereon to found it." *R. v. Sir O. Buller*, 3 Lev. 223; Bac Abr. tit. "Sci. Fa." C. 138; *Bynner v. The Queen*, 9 Q. B. 523. Letters patent for invention, though issued out of chancery as being under the great seal, have long been treated in a different manner from other letters patent. The earliest statute regulating their grant is 18 Hen. 6, c. 1. It has been followed by a long series of statutes; the present general statute is 15 & 16 Vict. c. 83.

tices or the sheriffs to give such remedy as the occasion required (*p*). When the circumstances of a case were similar to others that had preceded it, old established forms were, by the rule of the court, adopted; but when new cases arose, which could not be dealt with under any existing form of action, in order to prevent the harsh or imperfect judgment which might otherwise ensue, a new form of writ was sought for.

This was the custom not only among our Saxon ancestors before the institution of the *Aula Regia* (*q*), but also * after its dissolution, in the reign [* 31] of Edward I. (*r*), and, perhaps, during its continuance in that of Henry II. (*s*).

The chief judicial employment of the chancellor in these very early times, therefore, must have been in devising, with the assistance of his clerks, new writs directed to the courts of common law, to give remedy in cases where none was before administered (*t*). To quicken the diligence of the clerks in chancery, who were supposed to be too much attached to ancient precedents, it is provided by the statute of Westminster the second (13 Edw. 1, *Statute of Westminster 2* c. 24), that "whosoever from thenceforth a writ shall be found in the chancery, and in a like case falling under the same right, and requiring like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one: and if they cannot agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law (*u*), lest it happen for the future that the court of our [* 32] lord the * king be deficient in doing justice to the suitors;" and the statute gives a variety of new precedents of writs, some of them for cases previously unprovided for. Thus is accounted for the number of writs of trespass on the case to be met with in the ancient register, whereby the suitor had relief according to the exigency, and adapted to the special circumstances and justice of his case (*x*).

In process of time, however, the chancellor came to do more than furnish the first ingredients of judicial action; he always sat as a member of the *Aula Regia*, and was accustomed generally to attend the king in person for the purpose, amongst other things, of giving him advice; indeed, he was doubtless the principal legal adviser on all occasions. It was natural, therefore, that he

(*p*) Mirror of Justice, 176, ed. 1646.

(*q*) *Nemo ad regem appellet pro aliqua lite, nisi jus domi consequi non possit. Si jus nimis severum sit, alleviatio deinde queratur apud regem.* LL. Edg. c. 2. In very early times, the mode in which the relief was granted was by plaint to the king, who, with the assistance of his chancellor or secretary, framed a writ or letters to the judges: the most ancient form of such writ being as follows:—"Rez, &c. (to the judge.) *Questus est nobis A. quod B., &c., et ideo tibi (vices nostras in hac parte committentes) præcipimus quod causam illam audias et legitimo fine decidas.*" Mirror of Justice, p. 8.

(*r*) Lambard Archeion, 59.

(*s*) Joannes Sarisburiensis (who died A. D. 1182, 26 Hen. 2), speaking of the chancellor's office in the verses prefixed to his *Polyeraticon*, has these lines:—

"*Hic est qui leges regni cancellat iniquas,
Et mandata pii principis æqua facit.*"

(*t*) See Chief Baron Gilbert's reasons for the institution of the *officina brevium*, History and Practice, p. 10.

(*u*) I. e., the clerks or masters in chancery, of whom Fleta, lib. ii. ch. 12, says, "*Cui (cancellario) associantur clerici honesti et circumspecti Domino Regi jurati qui in legibus et consuetudinibus Anglicanis notitiam habent pleniorum quorum officium est supplicationes et querelas conquerentium audire et eis super qualitatibus injuriarum ostensurum debitum remedium exhiberi per brevia Regis;*" and elsewhere, "*Episcopi autem collaterales et socii cancellarii esse dicuntur præceptores eo quod brevia causis examinatis remedialia fieri præcipiunt et hoc quandoque tam sine denariis ad opus Regis tam sine fine,*" &c.

(*x*) Lambard Archeion, ed. 1635, p. 61. A discretion as to issuing a new form of writ has been called into exercise in times much more recent than that of Edward I. See *The Rioters' Case*, 1 Vern. 175.

should early take cognisance of some legal matters, and especially those connected with rights depending upon the king's grants, since he, being the holder of the great seal, was the officer through whom they had been obtained. Thus arose the ancient common law jurisdiction of the chancellor. It is not possible to fix with exactness the time when it may be said first to have been completely established, but its authority is recognised in very early times (*y*).

As a court of justice, it has now almost reached a fossil state, the only matters which for many years have been brought before it judicially being a few suits relating to patents for invention, but its ancient jurisdiction was to hold plea upon a *scire facias* (*z*) to repeal and cancel the *king's letters patent of all kinds when made against law, or upon untrue suggestions (*a*), to hold plea of petitions of right (*b*), *monstrans de droit*, traverses of offices found upon inquisition of escheated lands or in lunacies (*c*), and the like, or when the king has been advised to do any act, or has been put in possession of lands or goods in prejudice of a subject's right (*d*).

Much of this jurisdiction of the chancellor seems but natural, because, since the king can never be supposed to do any wrong, if any error be proved to have arisen whereby a subject has suffered, the law assumes that, on due proof of it, he will give immediate redress, and a conscientious task like this would, of course, be performed by the chancellor, the keeper of his conscience.

The jurisdiction of the court extended over all personal actions where any officer or minister of the court was a party, over partitions (by *scire facias*) of lands in coparcenary (*e*), and, whilst military tenures existed, over claims for dower where any ward of the court was concerned in interest (*f*). It afterwards retained jurisdiction in cases relating to tithes of forest land, where granted by the king, and claimed by a stranger against the grantee of the crown (*g*), and over executions upon *statutes or recognisances in the nature of [* 34] statutes, by the statute 23 Hen. VIII., c. 6 (*h*).

The proceedings in a suit in the common law court, when it was more used than is now the case, were not dissimilar to common law actions elsewhere.

If, however, any cause came to issue, that is, if any fact were disputed between the parties, the chancellor having no power to summon a jury, could not try it (*i*), he then must deliver the record or a

(*y*) Lord Campbell supposes that the chancellor, during the existence of the *Aula Regia*, practically decided questions similar to those which were afterwards recognised as coming within his common law jurisdiction, by that court referring such questions for his opinion; and he concludes that when the *Aula Regia* was broken up, the chancellor assumed the jurisdiction, and so established a separate court. Lives of the Chancellors, p. 6.

(*z*) The writ is *scire facias*, because, as above stated, a patent is a record in chancery. The practice of issuing the same writ in similar cases, returnable in the King's Bench, seems to have first been established in Queen Anne's reign. *Brewster v. Wells*, 6 Mod. 230.

(*a*) Similar suits were afterwards sometimes instituted on the English side. See *Sawyer v. Vernon*, 1 Vern. 277, 370; and *Attorney-General v. Corporation of London*, 8 Beav. 270; 1 H. L. C. 440; 12 Beav. 8.

(*b*) Rastell's Entries, 461 a. (a petition of right under 7 & 8 Hen. 8.)

(*c*) Yearbooks, 4 Edw. 4, 29 a; 13 Edw. 4, 8 a; 1 Hen. 7, 14 a. See *In re Ann Parry*, 85 L. J. Ch. 651; *In re Kane*, *ib. n.*

(*d*) 4 Rep. 54.

(*e*) Co. Lit. 171; Fitz. Nat. Brevium, 62. The writ of partition formerly issuing out of chancery is now abolished, 3 & 4 Will. 4, c. 27, s. 86.

(*f*) Bro. Abr. tit. Dower, 66; Moor, 565.

(*g*) Bro. Abr. tit. Dismes, 10.

(*h*) 2 Rol. Abr. 469.

(*i*) The recent Act, 21 & 22 Vict. c. 27, s. 3, gives the Court of Chancery power to summon a jury. That Act, though probably not intended to affect procedure in the Petty Bag Office, still, is not in terms confined to the equity side of the court, and would therefore, seemingly, enable a suit in the Petty Bag Office to be completely tried there. By the Chancery Regulation Act, 1862 (25 & 26 Vict.

transcript of the record, *propria manu*, into the Court of King's Bench, where it could be tried by the country, and judgment given thereon (*k*).

When judgment was given in chancery upon demurrer or the like, a writ of error in the nature of an appeal lay out of this ordinary court into the King's Bench (*l*). This right of appeal has been so little exercised, however, that Sir [* 35] W. Blackstone said that he could find no * trace of a writ of error being actually brought since the 14th year of Queen Elizabeth, A. D. 1572.

The proceedings in this court as a court of justice have, even in these few suits which we have mentioned, been long confined to the formal proceedings, such as the pleadings, the substantial trial of the merits being in the Court of Queen's Bench (*m*).

There have always been two branches of this common law court, one called the Court of the Hanaper, the other the Court of the Petty Bag. In the former, writs relating to the business of the subject, and the returns to them, were kept according to the simplicity of ancient times, in a hamper (*in hanaperio*). In the latter, those relating to matters wherein the crown was immediately or mediately concerned, were preserved in a little bag. The distinction between the two branches still exists, though the Petty Bag is the branch in which, for obvious reasons, most vitality remains. From it issue writs of what may be called a ministerial nature, such, for instance, as writs of election issued on calling a new parliament, writs of *congé d'élire* for the appointment of bishops and archbishops. In the Petty Bag Office, as a court of record, are kept the records of an endless variety of proceedings, not to be here enumerated; the above examples are sufficient illustrations of its present duties. We may add, however, the inrolment in chancery of deeds, such as disentailing deeds, which forms part of the duties of the common law side of the court. The practice and duties of the officers in the Petty Bag Office, and of the Inrolment Office have recently been regulated by the legislature (*n*).

The Extraordinary Court, or Court of Equity, has now become the court of the greater judicial consequence, and this in such a marked degree that many well-informed * persons are hardly, if at all, aware that the Court of Chancery possesses any judicial or administrative functions other than its equitable ones. Recent legislation has so far modified the practice, and added to the duties of the equitable

c. 42) it is made obligatory upon the court to decide questions of fact (s. 1), unless it can be more conveniently tried elsewhere (s. 2). *Quere*, as to the effect of this upon a suit in the Petty Bag Office.

(*k*) Cro. Jac. 12; Latch. 112. There has been recently a case of revocation of letters patent for an invention, initiated by *scire facias* in the Petty Bag Office, *Bynner v. The Queen*, 9 Q. B. 523, in which some points of practice were considered, but *quere* whether they are still the law.

(*l*) This is the opinion of Sir W. Blackstone (citing Yearbook, 18 Edw. 3. 25; 17 Ass. 24; 29 Ass. 47; Dyer, 315; 1 Roll. Abr. 287; 4 Inst. 80,) who remarks that a contrary opinion given by Lord Keeper North, in *R. v.*

Cary, 1 Vern. 131, Eq. Ca. Ab. 129, pl. 9, *S. C.*, was not well considered. In *Foxwith v. Tremain*, 1 Vent. 102, one of the points resolved by the Court of King's Bench was that a writ of error did lie out of the Petty Bag into B. R. on an error in fact. See also *Bynner v. The Queen*, 9 Q. B. 523. Mr. Macqueen however, in his learned work on the Appellate Jurisdiction of the House of Lords (p. 369), contends that the only appeal is to the House of Lords.

(*m*) But see the doubt suggested in a former note as to whether this is now the case.

(*n*) 11 & 12 Vict. c. 84, amended by 12 & 13 Vict. c. 109. These acts do not specifically mention the Hanaper office.

side of the court, that the business transacted by it equals in extent that of the common law courts.

The distinction between law and equity, as administered in different courts in England, is not at present known, and seems not to have ever been known in other countries (*o*), (444) though the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans (*p*), the *jus prætorium*, or discretion of the prætor, being distinct from the *leges* or standing laws (*q*); but the power of both centred in one and the same magistrate, who was equally entrusted to pronounce the rule of law, and to apply it to particular cases by the principles of equity.

With us, too, the *Aula Regia*, presided over by the chief justiciar, which was the supreme court of judicature, and in which all cases of importance were tried, undoubtedly administered equal justice according to the rule of both law and equity, or either, as the case might require. When this court was broken up, though there was no formal establishment of a court of equity, yet it is probable that some desire for freedom from the trammels of strict legal procedure would often be felt, which desire *would scarcely be disregarded. Still, though Bracton mentions equity as a thing contrasted to strict law (*q*), neither that writer nor Glanvil, nor the author of Fleta, nor even Britton (who wrote under the auspices, and in the name of Edward I., treating particularly of courts and their several jurisdictions), mentions anything about the chancellor's equitable jurisdiction. [* 37]

Probably it was with the view of satisfying this desire that the statute of Westminster the Second was passed, which, by the ready issue of suitable writs, and with a little elasticity on the part of the judges, might probably have answered every purpose; indeed, opinions to this effect have been expressed by eminent judges (*r*). The only real want which might then have remained unsatisfied would have been that of obtaining discovery upon oath from the defendant (*s*).

It seems, however, that notwithstanding the varied forms of actions so devised, and the means afforded for further developement, courts of law, through a too rigorous adherence to established forms, and the letter rather than the spirit of law, still fell short of administering that complete relief which a natural sense of justice seemed to require. No satisfactory reason can be given why this should have been the case; certainly in modern times courts of law do not exhibit the same narrowness of spirit, and they have long rejected

(*o*) The Council of Conscience, instituted by John III. of Portugal to review the sentences of all inferior courts, and moderate them by equity (Mod. Un. Hist. xxii. 237), seems to have rather a court of appeal than a court of distinct jurisdiction.

(*p*) Thus too the Parliament of Paris, the Court of Session in Scotland, and every other jurisdiction in Europe of which we have any tolerable account, found all their decisions as well upon principles of equity as those of positive law. (Lord Kames' Hist. Law Tracts, i. 325, 330; Princ. of Equity, 44.)

(*q*) Thus Cicero:—"Jam illis promissis non esse standum, quis non videt, qui coactus quis metu et deceptus dolo promiserit? qui quidem

plerumque jure prætorio liberantur, nonnulla legibus. Offic. l. i.

(*q*) l. 2, c. 7, fol. 23.

(*r*) "*Le subpœna ne serroit my cy souvenement use come il est ore, si nous attendomus tiels actions sur les cases et mainetnomus la jurisdiction de ceo court et d'auter courts.*" Per Fairfax, a learned judge of Edward the Fourth's time. See Yearbook, 21 Edw. 4, 23.

(*s*) This important requisite for the attainment of justice might have been provided by the legislature in common law courts somewhat before the time (1854) when it was actually furnished. (See Common Law Procedure Act, 1854, s. 51.)

some of the old rigid rules: still, they have, naturally, been unable in many instances entirely to disregard the authority of ancient precedents, and it is [*38] but very recently that they have *received any adequate aid from the legislature. But, whatever may have been the reason, a court of equity was found to be a necessity, if complete justice was to be obtained.

An important influence towards its establishment came into operation, when in the 14th century (t) there grew up new doctrines concerning the holding and enjoyment of property, separating the legal title from the right to the beneficial enjoyment of it, in imitation to some extent of the usufructus of Roman law, though arising out of causes peculiar to the age. With the growth of these doctrines there arose a necessity or desire for the judicial recognition of trusts or uses, as they were commonly called (u). The device of one person having the legal dominion over property, but bound to allow another to have the full benefit of it, was found to meet and overcome several obstacles which the law had imposed upon the disposition of landed property. Of these, perhaps, the most notable was the law of mortmain, prohibiting lands from being given for religious purposes. Ecclesiastical chancellors, therefore, readily sanctioned the plan of avoiding these statutes, by vesting the legal estate of lands in persons to the use of the religious houses, and then, by binding the conscience of the legal owner to give effect to the use. And since the jurisdiction to enforce this obligation was refused by court of law (v), it was assumed by the Court of Chancery. The invention of the writ of subpœna, returnable only in the Court of Chancery, by which the feoffee to uses was [*39] made *accountable to his *cestui que use* is ascribed to the "subtilty" of John de Waltham, Bishop of Salisbury, and chancellor to Richard II. (x). This writ, requiring the defendant to appear to and answer a bill of complaint in the Court of Chancery, continued from that time until very recently, to be the foundation of a chancery suit. It was originally framed under a strained construction of the above-quoted statute of Westminster the Second; but the process having been found to answer well the ends of those who used it, the practice of issuing it was soon extended to many cases, even to some which were properly determinable at common law; a false and fictitious suggestion being made in the bill that common law furnished no relief. To remedy this, which was thought to be an evil, the statute 17 Rich. 2, c. 6, was passed, by which the chancellor was directed to award damages to the party unjustly vexed by such a proceeding. It may be noticed that the clergy

(t) 1 Sand. Uses, 12.

(u) It has been commonly thought that the jurisdiction over trusts was one of the principal causes of the equitable jurisdiction being assumed by the Court of Chancery. Lord Campbell, however, gives reasons for believing that it did not play so important a part in this matter as was supposed. Still it must have had much to do with the determination with which the chancellors adhered to their power when once assumed. See Lord Campbell's Lives of the Chancellors, p. 10.

(v) Not, however, without some occasional wavering. See *Jevon v. Bush*, 1 Vern. 349, and note (3) to that case.

(x) Rot. Parl. 3 Hen. 5, n. 46; Spelm. Gloss. 106; 1 Lev. 242; 1 Roll. Abr. 371. John de Waltham was master of the rolls, but had

the great seal entrusted to him on several occasions. Rymer, vii. 362, 381, 496; 510. From the invention of trusts and the exclusive control which the court of equity took of them, there naturally grew up that vast administrative business by which family estates and property are preserved and managed under the direction of the court, which now occupies so large a portion of its attention. The policy of recent legislation is to continually add to this part of the court's duties, the exercise of judicial discretion being clearly most beneficial to those persons who occupy the position of guardians, and those (such as infants) who are entitled to the enjoyment, yet incapable of the management of property.

so early as the reign of King Stephen had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits, *pro latione fidei*, as a spiritual offence against conscience, in case of non-payment of debts or breach of civil contract (*y*), and these attempts were continued till they were checked by the Constitution of Clarendon (*z*), which declared that "*placita de debitis quas fide interposita debentur vel absque interpositione fidei sint * in iustitia regis.*" Yet even after this enactment the spiritual courts continued [* 40] to grasp at the same authority (*a*) down to so late a time as the fifteenth century (*b*), till finally prohibited by the unanimous consent of all the judges.

The fact is undoubted, and the reasons are sufficiently apparent, that the chancellors clung to, and sought to extend, the jurisdiction which they had acquired, and they succeeded in doing this, notwithstanding that repeated efforts were made to put an end to their power. We find that in the reigns of Henry IV. and Henry V. (*c*), there were several petitions presented by the commons to the king, urging the suppression of the writ of subpœna as a novelty contrary to the form of the common law, whereby, as they declared, no plea could be determined unless by examination and oath of the parties, according to the form of the civil law, and the law of holy church, but in subversion of the common law. Henry IV., feeling perhaps not too secure on his throne, evaded these requisitions, or even, to some extent, acceded to them (*d*); but Henry V. gave a decided negative to the application, and the process by writ of subpœna and bill in chancery then became, *and continued to be, until the year 1852 (*e*), the daily [* 41] practice of the court, its application being constantly extended.

Equitable jurisdiction of some kind was, no doubt, exercised before the time of John de Waltham's writ, but it seems to have been the first instance of process issued out of the Court of Chancery without special commission from the king, or special authority derived from parliament (*f*), for the purpose of enforcing equitable rights by the authority of that court alone. Thus was established, in addition to his ordinary power (*potentia ordinata*), the extraordinary or absolute power (*potentia absoluta*) (*g*) of the chancellor, in the exercise of which he disregarded the ordinary rules of procedure in courts of law (*h*), adopted such means, by examination on oath of the parties or

(*y*) Lord Lytt. Hen. 2, b. 3, p. 361.

(*z*) 10 Hen. 2, c. 15; Speed, 458.

(*a*) In 4 Hen. 3, suits in court christian *pro latione fidei* upon temporal contracts were adjudged to be contrary to law. (Fitzh. Abr. tit. Prohibition, 15.) But in the statute or writ of *circumspecte agatis*, supposed by some to have issued 13 Edw. 1, but more probably (3 Pryn. Rec. 336) 9 Edw. 2, suits *pro latione fidei* were allowed to the ecclesiastical courts, according to some ancient copies (Berthelet, Stat. Antiq. Lond. 1581, 90, b.; 3 Pryn. Rec. 336), and the common English translation of that statute, though in Lyndwode's copy (Prov. 1. 2, t. 2), and in the Cotton MS. (Claud. D. 2), that clause is omitted.

(*b*) Yearbook, 2 Hen. 4, 10; 11 Hen. 4, 88; 38 Hen. 6, 29; 20 Edw. 4, 10.

(*c*) Rot. Parl. 2 Hen. 4, 69; 4 Hen. 4, 78 & 110; 3 Hen. 5, 46, cited in Prynne's Abridg. of Cotton's Records, 410, 422, 424, 548. See 4 Inst. 83; 1 Roll. Abr. 370, 371, 372.

(*d*) See 4 Hen. 4, c. 23, by which judgments

at law were made irrevocable, except by attaint or writ of error, and not to be impeached in equity. Doctor and Student, Dial. 1, c. 18.

(*e*) See 15 & 16 Vict. c. 86, s. 2.

(*f*) Lord Campbell gives an instance, taken from the Close Rolls, of a suit for specific performance in 40 Edw. 3, where the plaintiff petitioned the king in parliament, who caused the defendant to come before the chancellor, the treasurer, the justices, and other sages; and he states that the records of the court of chancery contain other instances still earlier of the exercise of equitable jurisdiction, though none so early of compelling the execution of a trust. Lives of Chancellors, 8 n.

(*g*) Ellesmere, 44.

(*h*) Though the procedure which grew up in chancery was far from being free from reproach. See, for instance, the table of processes to compel appearance and answer exhibited in page 152 of the Report of the Chancery Commission, 1826.

otherwise, as seemed best calculated to discover the truth, and enforced obedience to his decrees by imprisonment. The chancellors did not, and probably felt that they could not, assume all the powers which were exercised by courts of law; such, for instance, as summoning a jury to determine questions of fact, and this became one of the principal defects of the court, which have recently been rectified. In its judgment, the Court of Chancery, whilst adhering to those rules of law which were consonant with principles of equity, boldly overruled those rules or maxims of almost absurd and fanciful rigour [* 42] which had been laid down and pertinaciously adhered to by judges, * notwithstanding that through the accidents or necessities of social life they in fact often worked great injustice (i).

The relief given, as compared with that now obtained, did not, however, for a long time extend very far; for in the ancient treatise entitled *Diversité des courtes*, or Diversity of courts and their jurisdictions (k), written by an unknown author in the time of King Henry the Eighth, we have a catalogue of the matters of conscience then cognisable in chancery, and these fall within a very short range (l). No regular judicial system or rules of equity at that time prevailed in the court. A suitor who thought himself aggrieved could but obtain a desultory and uncertain remedy according to the private opinion of the chancellor (m), generally, and as we have already remarked in very early times always, an ecclesiastic, sometimes, though rarely, a statesman, scarcely ever a lawyer. From the times of the chief justices Thorpe and [* 43] Knyvet, successively chancellors to King Edward III. in 1372 and * 1373, till the promotion of Sir Thomas More by Henry the Eighth in 1530, no lawyer sat in the Court of Chancery (n). After this time the great seal was indiscriminately committed to the custody of lawyers, courtiers (o), and churchmen (p), according as the convenience of the moment, or the caprice of the sovereign, might require, until, in 1592, Sergeant Puckering was made lord keeper, from which time to the present the Court of Chancery has always been filled by a lawyer; except that during the interval from 1621 to 1625 the seal was entrusted to Dr. Williams, then Dean of Westminster, but afterwards Bishop of Lincoln, who had been chaplain to Lord Ellesmere when chancellor (q). But it is only in very recent times that men have, as a general rule, been made judges in the Court of Chancery who have specially devoted

(i) Such as the rule that a debt or other chose in action shall not be assigned; notwithstanding what Lord Coke says — "The great wisdom and policy of the sages and founders of our law have provided that no possibility, right, title, nor thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression to the people, and chiefly of terre tenants, and the subversion of the due and equal execution of justice." *Lampet's Case*, 10 Rep. 48. See, as to the present policy of the legislature, 30 & 31 Vict. c. 144, which gives to assignees of a policy of life assurance the right to sue at law in their own name; and the similar act relating to marine insurances, & 32 Vict. c. 86.

(k) See title-page of English edition, 1646.

(l) Tit. Chancery, p. 296, Rastell's edit. 1534; p. 293, English edit. 1646.

(m) "Equity is a roguish thing. For law, we have a measure, and know what to trust to; equity is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience." (Selden's Table Talk, tit. Equity.) This, though scarcely just at the time it was written, might with more truth be applied to the early exercise of the court's jurisdiction.

(n) Spelm. Gloss. 111; Dugd. Chron. Ses. 50.

(o) Wriothesly, St. John, and Hatton.

(p) Goodrick, Gardiner, and Heath.

(q) Biog. Brit. 4278.

their study to the doctrines of equity as distinguished from the rules and practice of common law courts. Equity lawyers are of very modern extraction (r).

The establishment of a series of rules and precedents guiding and controlling the judgment of equity judges, and, to a great extent, excluding the application of any peculiar personal notions of justice, at the same time extending and defining the nature of the relief which the Court of Chancery will, and which a court of common law will not, grant, has been gradual. Among other *questiones vexatæ*, one great one occurred as to the power of the Court of Equity to interfere with judgments or proceedings in courts of law, a notable dispute as to which was set on foot by Sir Edward Coke, then chief justice of the Court of King's Bench. That distinguished *judge strenuously contended against the assumption which was made on the part of a court of equity to restrain by [* 44] injunction, i. e., on pain of imprisonment, a complainant at law from pursuing his remedy at law, and reaping the fruits of his success.

This contest, which took place when Lord Ellesmere was chancellor (A. D. 1616), was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a *præmunire* by questioning in a court of equity a judgment in the Court of King's Bench obtained by gross fraud and imposition (s).

This matter being brought before the king, was by him referred to his learned counsel for their advice and opinion, who reported so strongly in favour of the courts of equity (t), that his majesty gave judgment on their behalf; but, as might be expected from King James's character, he, not content with the irrefragable reasons and precedents produced by his counsel (for the chief justice was clearly in the wrong), chose rather to decide the question by referring it to the plenitude of his royal prerogative (u). Sir Edward Coke submitted to the decision (z), and thereby made atonement for his error; but this struggle, together with the business of *commendams* (in which he acted a very noble part) (y), and his conduct *relative to the commissioners [* 45] of sewers in insisting upon their being subject to the control of the Court of King's Bench were the open and avowed causes (z) first of his suspension and then of his removal from office.

Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the

(r) It is said that when Lord Eldon first practised at the bar, there were but twelve or fifteen counsel regularly practising at the chancery bar. Twiss's Life of Lord Eldon, p. 117.

(s) Bacon's Works, iv. 611, 612, 613.

(t) Whitelock on Parl. ii. 390; 1 Ch. Rep. Append. 11.

(u) "For that it appertaineth to our princely office only to judge over all judges, and to discern and determine such differences as at any time may and shall arise between our several courts touching their jurisdictions, and the same to settle and determine as we in our princely wisdom shall find to stand most with our honour," &c. 1 Ch. Rep. Append. 28. Williams, *Jus Appellandi*, p. 123.

(z) See the entry in the council book, 26 July, 1616; Biog. Brit. 1390.

(y) In a cause of the Bishop of Winchester, touching a *commendam*, King James conceiv-

ing that the matter affected his prerogative, sent letters to the judge not to proceed in it till himself had first been consulted. The twelve judges joined in a memorial to his majesty declaring that their compliance would be contrary to their oath and the law. But upon being brought before the king and council they all retracted and promised obedience in every such case for the future, except sir Edward Coke, who said, "that when the case happened he would do his duty." Biog. Brit. 1388.

(z) See Lord Ellesmere's speech to sir Henry Montague, the new chief justice, 15 Nov. 1616. (Moor's Reports, 828.) Sir Edward Coke might probably have retained his seat, if during his suspension he would have complimented Lord Villiers (the new favourite) with the disposal of the most lucrative office in his court. Biog. Brit. 1391.

court to a more regular system (a); but did not sit long enough to effect any considerable revolution in the science of equitable jurisprudence itself, and few of his decrees that have reached us are of any great consequence to posterity.

His successors, in the reign of Charles I., did little to improve upon his plan. Lord Clarendon, when the seal was committed to him, had withdrawn from practice as a lawyer nearly twenty years (b), and the Earl of Shaftesbury, who received it on Clarendon's fall, though a lawyer by education, had never practised at all. But somewhat later there was a change, when, in 1673, Sir Heneage Finch, afterwards Earl of Nottingham, became chancellor. He was a person of the greatest abilities and most incorruptible integrity, a thorough master and zealous defender of the laws and constitution of his country. His genius enabled him to discover the true spirit of justice, notwithstanding any [* 46] embarrassments raised by the narrow and *technical notions prevailing in courts of law, and the imperfect ideas of redress then recognised in courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade, and the abolition of military tenures, co-operated in establishing his plan, and enabled him to build up, in the course of nine years, a system of jurisprudence and jurisdiction upon wide and rational foundations. This has been extended and improved by the many great men who have since presided in chancery, and constitutes a noble monument to their memory, *monumentum æere perennius*. The great variety in the necessities, the desires, and the habits of society, and the craft of men following the increase of riches, rendered the comparatively simple procedure of courts of law inadequate for the complete administration, though often well adapted to the ordinary administration of justice; and this led, as we see, to the application for an adequate remedy to the jurisdiction of the Court of Equity, and thereby to the establishment of that jurisdiction. Now this application was always in the form of a petition of the party aggrieved, stating the grievance, the defect of remedy in the courts of common law, and mentioning the remedy which it was conceived ought to be administered. By the nature of most of such cases, a part of this remedy consisted in the unravelment of a long chain of fraud, the examination of complicated accounts, or the administration of large properties; the mere enumeration of these seems suggestive of cumbrous machinery, and it must be admitted as a fact, that the procedure which grew up in the court, though powerful to redress wrong, was also often, and this from an almost excess of caution, attended with such delay and expense as almost to defeat its own objects. This was a grievance not likely to escape the reforming spirit of the present century. It was easily recognised that whilst the motive vital power of the court might be developed [* 47] and expanded, the weight of its machinery, * which bore it down and diminished its efficacy, might be with safety lessened. Accordingly, in 1824, a royal commission was appointed to consider whether any alterations might advantageously be made in the practice of the court so as to abridge the expense and time attending proceedings in the court. This commission, in

(a) He appears to have published, about the year 1618, a collection of orders, comprising the more important rules of practice which had previously obtained. See Chancery Commission Report, p. 10.

(b) Lord Clarendon's Orders as to Practice, published in 1661, which, however, were little more than copies of those published in 1656 by the Lords Commissioners Whitelock, Lenthall, and Keeble, continued in force as regulating the practice of the court until very recent times.

1826, made an elaborate report, and since that time numerous statutes have been passed for the purpose of remodelling the procedure, and correcting errors, or supplying deficiencies in the various offices of the court (c). By abolishing many useless forms and requisitions, due to an over anxiety for the prevention of injustice, by retaining only those rules of practice which involve the essence of the administration of justice, by adding further powers to the court, a reform has been carried out to such an extent that we may safely affirm, that at the present day the Court of Chancery is nearly as free from reproach on the score of useless formalities, expense and delay, which bring disappointment to the suitor, as it has ever been in regard to the purity of the principles governing its decisions. We shall presently recur to this subject in the course of giving an outline of the present procedure by suit. We have, in what we have said, sufficiently traced in outline the history of the establishment of the court as a court of equity, presided over by the Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal (d). It remains to say somewhat concerning the other officers and the present subdivision of judicial labour.

In addition to the Lord Chancellor, there has been from * the earliest [* 48] existence of the court (e), an officer called the Master of the Rolls, to

The Master of the Rolls. whom the custody of the records, or rolls of the court, was entrusted. It appears, however, that his duties always extended beyond those merely of a conservator to the superintendence of the issue of writs (f), and there seems no doubt that he in very early times took part in the judicial administration, not only of the common law, but also of the equity side of the court (g), though as to the exact extent of his authority there has been much controversy (h); but it is certain that he in later times acted as a judge, subordinate in authority to the Chancellor, his decisions being subject in some degree to modification by the Chancellor. In order to remove the doubt as to his authority in hearing and determining causes, an act was passed in the reign of Geo. II. (3 Geo. 2, c. 30), by which it was declared that all orders and decrees made by him, except such as by the course of the court were appropriated to the great seal alone, should be deemed to be valid, subject nevertheless to be discharged or altered by the Lord Chancellor, so as they should not be inrolled until signed by his lordship. The business disposed of by him continued, however, to be of limited character (i) until

(c) See 2 Will. 4, c. 33; 3 & 3 Will. 4, c. 111; 5 & 6 Vict. c. 103; 3 & 4 Vict. c. 94, amended by 4 & 5 Vict. c. 52; 5 Vict. c. 5; and 8 & 9 Vict. c. 105; 11 & 12 Vict. c. 10; 13 & 14 Vict. c. 35; 14 & 15 Vict. cc. 4, 83; 15 & 16 Vict. c. 86, amended by 17 & 18 Vict. c. 100, and 18 & 19 Vict. c. 134; 15 & 16 Vict. c. 87, amended by 16 & 17 Vict. c. 98; 16 & 17 Vict. cc. 22, 78; 21 & 22 Vict. c. 27; 23 & 24 Vict. c. 149; 25 & 26 Vict. c. 42; and other statutes cited below.

(d) As to the authority of a lords keeper, see 5 Eliz. c. 18; and as to that of lords commissioners, see 1 W. & M. c. 21.

(e) In the earliest notice of a master of the rolls extant in the records of the court, it is said that the custody of the rolls of chancery was committed to Adam de Osgodby, "*ita quod custodiam illam eodem modo habent quo*

alii custodes eam habere consueverunt temporibus retroractis." Thus indicating the then ancient nature of the office. Rot. Claus. 23 Edw. 1. See also 2 Com. Dig. 208.

(f) 4 Inst. 82; Registrum Brevium, 7.

(g) See a Discourse of the judicial authority belonging to the office of the Master of the Rolls, 2nd edit. 1728. This work is ascribed to Lord Hardwicke. (Harris's Life of Lord Hardwicke, vol. i. p. 195.)

(h) In several instances in the reign of Henry VIII. the Master of the Rolls was styled Vice-Chancellor. See Discourse, &c., p. 20.

(i) And extent also, for at the time, in 1813, when the office of Vice-Chancellor of England was instituted, the Master of the Rolls only held his sittings in the evening.

another act, passed more recently (3 & 4 Will. 4, c. 94), has further declared
 [* 49] what judicial power * should be exercised by the Master of the Rolls; and under this act he now has complete power, as a judge, of primary jurisdiction.

Besides the Lord Chancellor and the Master of the Rolls, there were from very early times numerous officers having duties connected with both the common law and equity sides of the court. These offices (k) Other ancient officers. have, however, for the most part been abolished, and of those which remain the duties have been so far modified that it is unnecessary to do more than refer to them.

The vast increase of business in the court under the circumstances which have been already alluded to, and the great necessity which was felt for the more speedy despatch of that business, led to the appointment of a new judge, as a further assistant to the Lord Chancellor, under the title of Vice-Chancellor of England. Vice-Chancellor of England (l). His decrees and orders were, like those of the Master of the Rolls, subject to the revision of the Lord Chancellor.

Subsequently, in the year 1841 (m), when the equitable jurisdiction which had previously been exercised by the * Court of Exchequer was transferred to the Court of Chancery, two more Vice-Chancellors were appointed. At that time the Master of the Rolls had complete authority to hear and determine causes at all their stages, so that there were thus constituted four courts of primary jurisdiction of equal authority, but the decisions of all subject to appeal. The business of hearing appeals from these courts of primary jurisdiction soon became the principal duty of the Lord Chancellor, whilst sitting in chancery, and he has for some time confined his attention almost exclusively to it. The labour of this appellate business is now shared by two judges, called the Lords Justices of the Court of Appeal in Chancery, who, with the Lord Chancellor, now form the Court of Appeal in Chancery. This court was constituted in the year 1851 (n); it possesses and exercises all the jurisdiction previously possessed by the Lord Chancellor, and exercises and performs all powers, authorities, and duties, as well ministerial as judicial, incident to such jurisdiction, and also any which recent legislation may have added to those formerly belonging to the Lord Chancellor sitting in the Court of Chancery.

The functions of the Court of Appeal may be exercised not only by the full court of the three judges, but by the Lord Chancellor alone (who, it may be

(k) The masters in chancery were the principal of the subordinate officers, being appointed by letters patent. They were "for the most part doctors of the civil law, and do assist the court to show what is the equity of the civil law." (Ellesmere's Office of the Lord Chancellor, 87. See, also, 4 Inst. 82; Smith's Commonw. bk. ii. c. 12.) Their duties in very early times were, as before stated, mostly connected with framing writs; in later times, they transacted the greater part of the ministerial business, such as prosecution of inquiries into pedigrees, accounts, &c. Their offices, after being regulated by 3 & 4 Will. 4, c. 94, and 10 & 11 Vict. c. 60, were abolished by 15 & 16 Vict. c. 80, being replaced by the chief clerks of the

judges. Other ancient officers were the curators, whose offices were similar in character, but of inferior importance to the ancient masters, being the framers of those writs which were in common form (*brevia de cursu*), and the six clerks, who acted as attorneys on behalf of the suitors. See a Treatise on the Practice of the Court of Chancery, London, 1672, p. 66; and Gilbert's History and Practice, p. 9.

(l) See 53 Geo. 3, c. 24.

(m) See 5 Vict. c. 5; 14 Vict. c. 4; and 15 & 16 Vict. c. 80; by the last of which acts (s. 52) perpetual authority was given to fill up vacancies in the number of Vice-Chancellors.

(n) See 14 & 15 Vict. c. 83, ss. 1, 3, 5.

observed, retained his former jurisdiction unaffected (*o*), or by the Lord Chancellor sitting with one Lord Justice, or by the Lords Justices sitting together, apart from the Lord Chancellor (*p*). And by a still more recent act, power is given to each of the Lords Justices to sit separately as a Court of Appeal, for the purpose of hearing appeals from interlocutory orders of the primary courts (*q*).

The obvious advantages which result from the union of the two principles of justice, law and equity, so as to *enable one tribunal completely to [* 51] dispose of a case before it, have of late been much insisted upon, and there is a great tendency to give jurisdiction to courts of equity to deal with a case with the same powers and means of redress that courts of law have, and correlatively to give courts of law some equitable jurisdiction, each court retaining, however, its original distinctive character in respect of its primary functions.

Courts of equity have by recent acts been successively enabled (*r*) and required (*s*) to determine questions of law in cases where it was the old practice to require them to be decided by a common law court; more-
Recent acts. over, the novel power has been given (*t*) to summon juries for the determination of questions of fact and the assessment of damages, in certain cases, instead of granting an injunction against breach of contract or continuance of a wrongful act, or of granting specific performance of a contract. These enactments, by giving the Court of Chancery the power of dealing with a case in the same manner as a court of law would do, render its powers, in such cases, as complete as those possessed by the Roman Prætors. Again, by another act (*u*), courts of common law have power given them to a limited extent to deal with equitable grounds of defence to an action, and also to grant, in some cases, similar relief by injunction to that which the Court of Chancery alone previously granted.

It must not, however, be supposed that by the changes we have just mentioned, the Court of Chancery has become a court both of law and equity for all cases; otherwise it would, of course, be the only court to which suitors would ever resort in important cases, which is not the fact. The rule has been laid down (*x*), that unless some relief is sought of the peculiar character which *alone the court could formerly grant, and unless there is a [* 52] proper case for such relief, the court will not interfere. A similar remark applies to the common law courts. (445) They have only a limited

(*o*) 14 & 15 Vict. c. 83, s. 11.

(*p*) *Ib.*

(*q*) 30 & 31 Vict. c. 64, amended by 31 Vict. c. 11.

(*r*) 15 & 16 Vict. c. 86.

(*s*) 25 & 26 Vict. c. 43.

(*t*) 21 & 22 Vict. c. 27.

(*u*) 17 & 18 Vict. c. 125.

(*x*) *Durrell v. Pritchard*, L. R. 1 Ch. 244; *Ferguson v. Wilson*, L. R. 2 Ch. 77 (see pp. 88, 91).

(445) A few words as to the origin, perpetuation, and application of legal principles may be of service to the student.

Laws; their nature and objects. In every condition of civilized society there must be some customs, rules, or principles, by which rights may be investigated, duties or liabilities declared, controversies determined, and remedies enforced.

Among the advantages to be derived from entering into society are those of protection of person, and the security of property; and, therefore, men have a right, and they are in some degree compelled, to apply to the public authorities for redress when rights are withheld, or injuries have been committed.

power of dealing with equitable doctrines. Besides, the practice and mode of procedure, as we shall hereafter see, are still entirely distinct. There is, therefore, at present, no fusion of the two courts, and it remains equally

The natural right of individuals to redress wrongs, or to take the law into their own hands, cannot exist in a well-organized state of society, except in a few instances; and the general rule is, that all rights must be declared, and all remedies enforced by the proper tribunals in accordance with settled principles and the forms of law.

The elements or principles of a system of laws may be comparatively simple in form, and few in number, when considered with reference to their origin in an early stage of society; but, as the wants of society increase, the system will expand until it extends to and includes every case which, according to justice, and the public interest, requires consideration.

It is one of the great merits and advantages of the common law that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more so by judicial exposition; so that, when, in a course of judicial proceeding, by tribunals of the highest authority, the general rule has been modified, limited and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances.

The effect of this expansive and comprehensive character of the common law is that, while it has its foundations in the principles of equity, natural justice, and that general convenience which is public policy—although these general considerations would be too vague and uncertain for practical purposes, in the various and complicated cases, of daily occurrence, in the business of an active community—yet the rules of the common law, so far as cases have arisen, and practices actually grown up, are rendered, in a good degree, precise and certain, for practical purposes, by usage and judicial precedent. Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances.

The consequence of this state of the law is, that, when a new practice or a new course of business arises, the rights and duties of parties are not without a law to govern them; the general considerations of reason, justice, and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations, to the new circumstances. If these are such as give rise to controversy and litigation, they soon, like previous cases, come to be settled by judicial exposition, and the principles thus settled soon come to have the effect of precise and practical rules. *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263, 267, 268; *Bell v. The State*, 1 Swan. (Tenn.) 42, 43.

With the advancing state of society, new questions are constantly arising for decision, and the courts adapt the practice and course of proceedings to the existing condition of things, instead of adhering to forms and rules which were established under different circumstances; and they do not decline the enforcement of rights or the administration of justice, because there is no remedy according to the old forms or rules. *Wallworth v. Holt*, 4 Mylne & Craig, 635; *Osborn v. Gillett*, L. R., 8 Exch. 88, 97.

The principle upon which the courts proceed is, that the common law does not mould the habits, the manners, and the transactions of mankind to inflexible rules, but adapts itself to the business and the circumstances of the times, and keeps pace with the improvements of the age. *Lyle v. Richards*, 9 Serg. & Rawle, 351.

Our system of common-law rules and of equitable principles consists of the accumulations of several centuries, as is entirely evident when it is remembered that so much of our law is derived from that of England. As to the adoption of the English common law in this

important, now as formerly, to understand the distinction between law and equity, and the nature of the redress obtained in one court and in the other. (446) To explain the principles which govern a court of equity, and

country, see Vol. I, p. 42, note 14. So extensive, so complicated, so useful, and so practical a system could not be the work of one man, nor of one nation, nor even of one age. Its vast collection of adjudged cases is the growth of centuries; and, from a comparatively small number of decisions in the early times, the number has constantly increased, and the system of jurisprudence has expanded from time to time as the constantly recurring demands of men have presented questions to the tribunals for decision, until the result has been the establishment of a system of legal and equitable jurisprudence which is adequate to the demands or the necessities of a great commercial nation.

In the construction of this system the courts were constantly in the habit of applying to new combinations of circumstances those rules of law which were to be found in judicial precedents, or in works treating of legal principles; and, for the sake of attaining uniformity, consistency, and certainty, those rules or principles, unless clearly unreasonable, or inconsistent, were applied in all cases as they arose. But, notwithstanding the great number and variety of decisions, there always have been, and there are now, cases constantly occurring which are new in principle, or of first impression. So, too, there are cases which, though not new in principle, yet present questions which have never been determined. In all such cases, the courts avail themselves of the vast collections of principles which have been settled as law, and then, from the analogies of the law, and the reason and justice of the case, they decide in such manner as will best subserve the rights of the parties and the public interests, if such decision should be followed as a precedent.

In addition to the decisions of the courts, the legislature has enacted a vast system of statute law, in relation to rights and remedies. It is from this extensive system of legal and equitable jurisprudence, and from the various statutes of the State, that a knowledge of the practice of the courts is to be obtained. And while engaged in the study of that practice, it will be constantly borne in mind, that many of its rules are statutory enactments, instead of being principles established by the decisions of the courts. Yet, whenever the statute has not provided a rule, the courts are at liberty to resort to the decisions, for materials to supply the defect.

In the creation or establishment of laws, it is the province of the legislature to determine what is best for the public good, and to provide for it by proper enactments. The province of the judge is to expound the law, instead of making it. The written law he is to ascertain from the statutes; and the unwritten law he is to find in the decisions of his predecessors, and of the existing courts, or from the text-writers of acknowledged authority, and upon the principles which are clearly to be deduced from them by sound reason and just inference.

(446) The distinction between remedies at law and those in equity is important, and ought to be well understood by the student. This note will point out some of the general features of a legal action, and in the next note the subject of equitable actions will be noticed.

In general. Legal rules and principles must be expressed in general terms, and, therefore, it must sometimes happen that there are cases within the words but not within the reason or the spirit of the rule; while there are other cases within the meaning but not within the words of it. The reason of this is evident on the slightest examination, since it will readily be conceded that it is impossible for any one to foresee or provide for the endless series of complicated occurrences which must take place in society. And, whenever a case occurs which does not fall within the provisions of the general rules, there is a defect to be supplied, or injustice must result from that cause. In many of these cases, courts of equity have devised and applied such rules as a reasonable and just man would have provided had he foreseen the circumstances of the case, and had he authority to establish a rule for it. In some cases the legislature have enacted laws designed to provide remedies or rules in which the common law was found to be deficient.

The remedies afforded by the common-law courts are limited by the rules of the common law, which, as a general thing, are fixed and unbending; and one of the settled maxims of that system is, that a decided point furnishes the rule for future similar cases. In addition

to this, the character of the process, pleadings, mode of trial, and the judgment all tend to reduce the application of remedial justice to the enforcement of these fixed rules, instead of attempting to investigate the complicated equities which exist in so many cases, and in which no adequate relief is to be obtained except through equitable interference. From this general statement it will be seen that one of the distinguishing features of common-law remedies is, that they are usually unattainable except by the application of fixed, distinct rules, through the aid of a court, which seeks to apply and enforce these general rules to all cases, instead of investigating and securing any peculiar equities which may exist in some particular case or class of cases.

This system, which may seem harsh in some of its aspects, has, nevertheless, one very valuable feature, and that is, it is admirably adapted to the important end of securing certainty and uniformity in the administration of the law, a result which is invaluable to a commercial people.

Legal actions relate to some act done or omitted. It is the object of the law to give a remedy in every case which justly requires it. For this purpose the whole body of the law was created; and every important right is so guarded by familiar and public laws that each person may know what those rights are, and what remedy is afforded for an invasion of them. Every person is bound to know the general rules of the law or to submit to the consequences resulting from his ignorance, or his infringement of them. He who wrongfully invades the possession of his neighbor must respond in damages corresponding to the injury done. So he who inexcusably breaks a valid contract must make good the loss which the other party sustains in consequence.

In these cases, it will be observed, the law does not interfere until after the wrongful act has been committed, and it then holds the wrong-doer accountable for the damages resulting from his acts. The whole remedy consists in compensation to the injured party by way of damages assessed against the party in the wrong. The coercive power of the law is limited in its influence upon the parties, by declaring that every violator of its principles must respond in such damages as may be legally assessed against him, and enforced against his property or his person. It is by virtue of this system that most wrongful acts are prevented, and most contracts are performed, for the remedy by way of damages is a most effective one when properly administered. Beyond this species of remedy, the common law does not, as a general rule, extend; and, where a party would prevent the commission of a wrong, or would compel the specific performance of a contract, by means of the process of the courts, he must resort to a court of equity, where such remedies are one of the peculiar features of the system. In some peculiar cases a resort to a court of equity is to be preferred, because no damages probably attainable would be as valuable as the equitable relief which is certain, if sought. But, as a general rule, the courts of law are adequate to all the emergencies of the case, and they enforce most of the remedies which parties seek through the interposition of the courts.

Compensation in damages, or not at all. As has just been seen, the law gives damages for past injuries. But, beyond this relief, a common-law court does not go, for it will not interfere to prevent the violation of a right. It will give damages for the breach of a contract, but a court of equity will do more; it will anticipate the event, and restrain a person who merely shows an intention to break his agreement. It is in those cases in which the damages for past acts would be so small as not to afford an adequate remedy, that the powers of a court of equity are invaluable. In one of these classes of cases the relief obtained is remedial, in the other it is preventive; or, in other words, in one case it is legal, in the other equitable. Where these courts are separate, it is a general rule that neither court will usurp the functions of the other. And therefore if the injury complained of be completed, so that compensation alone can be awarded, a court of equity will not interfere, even though it might, in its discretion, have power to do so.

So, on the other hand a court of law will not entertain an application where no breach of contract has occurred, or no wrongful act has been done, even though it has power to issue an injunction under some circumstances.

In those States in which legal and equitable remedies are enforced by the same court, some of these distinctions may seem to be of no importance, and yet it is to be remembered that the mode of proceeding which is to be adopted must be either legal or equitable as the case may require.

Affords no relief outside of the general rules. At common law, simplicity and certainty in the practice is a prominent object, and, while the rules are so general as to be readily applied to the facts of each particular case, yet they cannot be so extended or varied as to meet the requirements of a system so complicated as some of the remedies afforded by a court of equity. And it is, therefore, a general rule, that the common-law courts do not afford any relief outside of its general system of legal remedies. If other relief is sought, a different court must furnish it, or the party may be remediless.

At common law, the judgments are uniform, simple and invariable, according to the nature of the action. In equity, the relief is modified to suit all the exigencies of the case fully and circumstantially; authoritative and binding declarations are made concerning the rights alleged; specific things are directed to be mutually done or permitted; and the conduct to be observed by the numerous parties is pointed out, although such parties may sustain relations of widely different characters, or be influenced by interests of a conflicting or important nature.

Do not compel specific performance of contracts. This subject has already been alluded to, but it is important that the student should understand the nature and the extent of the powers of courts of law, and of equity, if he would act intelligently in the pursuit of remedies.

There is no class of cases, perhaps, in which the want of power in a common-law court is more seriously felt, than in this one relating to the performance of contracts. In many cases, such a performance in good faith is of the utmost importance to the party who asks that it be carried out. His plans and other contracts may have been based upon its due execution, and his liabilities to others, as well as other consequent losses, may be such that no damages which would be given would make good. There are some instances, in which the contract relates to the personal conduct of a party, which no court will undertake to require to be literally performed, as a contract to sing at a theater, or write a book, or keep an inn, or build a house, for the reason that no degree of compulsion which the court could exercise would secure the desired result. But if the contract contains a negative clause, such as an agreement not to sing at any other theater, or not to write books for others or the like, there a court of equity will interfere by restraining the party from violating the negative clause. But in all such cases a court of law would be powerless except to give damages for the breach of the contract. The student will recollect that these remarks treat the matter as though there were separate courts of law and equity, instead of a single court which exercises the powers of both those courts.

Does not prevent the commission of wrongs. For injuries to real estate, the common-law actions of trespass, waste, nuisance, and the like, are the remedies usually sought. But, where the injury, if once done, would be irreparable, courts of equity sometimes interfere to prevent the commission of the wrongful act, and this relief a court of common law cannot grant. Any exception to this rule will be found to have a statutory origin.

Not adapted to complicated equitable cases. It is the tendency of any system of mere legal principles, when reduced to a practical application, to fail of effecting such justice between party and party as the special circumstances of a case may require, by reason of the minuteness and inflexibility of its rules and the inability of the judges to adapt its remedies to the necessities of the controversy under consideration. And it is accordingly found, that the rules of the common law, when reduced to practice, sometimes become the means of injustice in cases in which special equitable circumstances exist, which the court cannot take cognizance of because of the precise nature of common-law principles, their inflexible character, and the technical rules of pleadings and practice which were designed for no remedies except such as the common law afforded. To remedy these inconveniences, and to prevent injustice, the flexible, convenient and just system of equitable remedies was devised; until there are, at the present time, but few, if any, cases, in which the courts will not furnish all proper relief, in some form, if applied for in due time and in a proper manner.

Powers of the court terminate with the judgment, and its enforcement. At common law, a final judgment, when once entered, exhausts the powers of the court, except in the way of proceedings to review or reverse it. There is no power to open the judgment for the mere purpose of rendering a different judgment upon the same facts, or for the incorporation of facts not noticed upon the rendition of the judgment. If the judgment was regular and legal upon the facts established, the judgment is final and conclusive. If it was irregular, or illegal, the remedy is by way of proceedings to obtain its reversal. And even an action

will not lie at common law for the purpose of obtaining some relief or remedy to which the party was entitled, but which he neglected to present before the rendition of the previous judgment.

Courts of equity exercise much greater powers for the purpose of modifying their decrees, or for their impeachment when they are not such as justice and equity would sustain.

Extension of remedies by common law. The extension of remedies by the common law is not by devising new rules or principles, but by the application of existing rules to new combinations of facts, or to new cases which ought to be included in the settled rule. And, in the multiplicity of reported cases, it is a surprising fact that so many of them turned upon the question whether the conceded rule had been properly applied in the particular case, instead of the point whether there was such a rule as that claimed to be law. Courts of law do not usually claim or exercise the power of devising or creating new principles of law, but limit themselves to the administration or application of such principles as are recognized as the law of the land. And yet, such is the extent, variety and complication of human affairs that require to be settled by the courts, that it will be found that the simplest rule has been applied in a great number of cases which differ widely in the facts of each case; and it may seem in some instances as though a new rule had been adopted and enforced in some of them. Courts of common law, in a great variety of cases, adopt the most enlarged and liberal principles of decision; and, indeed, often proceed, as far as the nature of the rights and remedies, which they are called upon to administer, will permit, upon the same doctrines as courts of equity. This is especially true, in regard to cases involving the application of the law of nations, and of commercial and maritime law and usages, and even of foreign municipal law. 1 Story's Eq. Jur., § 84. In matters of mere practice the common-law courts possess and exercise greater powers in the adoption of ordinary rules of practice than in any other respect; and practice, it must be remembered, is but the application of those remedies which the law provides by its general rules.

Exceptions to general legal rules. When a rule of law has become well settled, the courts cannot properly disregard it. And in the application of this principle, it occasionally happens that a general rule, if strictly enforced, would be productive of hardship or injustice in some classes of cases. But it is to be remembered that an inconvenient or unjust rule of law may be remedied by the legislature; and, until that is done, it is best, as a general rule, to abide by the adjudged cases; for an attempt to change the rule by a judicial decision tends to unsettle the law, and it has been said by an able judge that "Hard cases make bad law." And the general practice is, to apply and enforce well-settled rules, even when they cause a hardship in some particular case. *Vermilya v. Austin*, 2 E. D. Smith, 208; *Beaulieu v. Finglam*, cited in argument in *Reedie v. London and North Western R. R. Co.*, 4 Exch. 251; *Freeman v. Tranch*, 14 Eng. Law & Eq. 224, 227; 12 C. B. 406; *Supervisors of Onondaga v. Briggs*, 2 Denio, 32.

There are instances, however, in which a subsequent case may resemble a former one in many of its principal facts, and yet it may also contain some important facts or elements which will bear upon the decision, and when this is the case, courts frequently act upon the principle of distinguishing the latter case from the former; and by that means are enabled to render such a decision as the justice of the case may require. *Quinn v. Lloyd*, 41 N. Y. (2 Hand) 353. But, while it is proper to act upon a substantial distinction, the courts cannot properly carry the rule so far as to act upon unsubstantial and shadowy distinctions which do not affect the merits of the case. Such distinctions have properly been termed by the courts nice, subtle, refined, thin, slight or slender, and they have frequently refused to act upon them; and yet, if the courts adopt or make a distinction, the decision is to be followed like any other established rule. It is not desirable to multiply distinctions, as they cannot fail to introduce uncertainty into the law, and in their subsequent applications to other cases may cause as much hardship as would have resulted from enforcement of the general rule.

Distinctions in the decision of causes are not always founded upon the principle that the court does not approve of the rule laid down in the previous case; for such decision may be fully concurred in, and yet the facts of the subsequent case may be so different in some particulars as to require the decision to be founded upon or modified by them.

Tries questions of fact by a jury. In common-law actions the right of having questions of fact tried and settled by the verdict of a jury is as much fixed as are the rights of the parties clear under the rules of the law.

regulate its decisions, and which are not recognised by a court of law as legal doctrines, and to show the character of the relief which a court of equity gives as distinguished from that which is obtained in a court of common law, will be our next task. (447) It is, however, one of great difficulty, because we are necessarily precluded from giving that complete and exhaustive account of the doctrines of equitable jurisprudence, which alone will completely separate and distinguish those doctrines on the one side from the more rigid rules adopted in common law, and on the other from the principles of natural morality, which must be left to the enforcement of the conscience alone, such as charity, or gratitude.

To explain the origin of this mode of trial, or to trace its history, or explain its advantages, is not the present object; but rather to point out the distinction between this method of trial and that adopted in courts of equity which, as a general rule, dispense with the aid of juries, and try questions of fact before the court itself, upon such evidence as may be proper. And when the nature of the two systems of remedies is considered, the propriety of the practice in each case will be evident. In simple direct issues the verdict of a jury would be convenient, safe, and satisfactory. But, in a case involving numerous issues, of an intricate nature, requiring many different special directions, such a trial would be a poor substitute for the careful, elaborate and equitable relief which may be awarded by a profound and conscientious judge who takes time to survey the whole case even to its minutest details, and then pronounces a decree which guards all the rights of both parties. A trial by a referee is not overlooked, but, as it is a mere substitute for a trial by jury, it does not require notice in this place.

Legal remedies may exist, and yet be insufficient. There are many cases in which the common-law courts furnish a partial though defective remedy, while courts of equity afford the fullest relief. To explain fully the particulars in which such relief may or may not be had at law, or to enumerate all the instances in which partial relief is attainable, is not to be expected in this place. A general synopsis of some of the cases will be convenient as an illustration of the defects mentioned.

At common law a corporation might have a good cause of action against one of its members, and yet, at law, no action could be brought upon it, while equity would give full relief. The same rule applies to the case of executors or partners. *Cole v. Reynolds*, 18 N. Y. (4 Smith) 74; *Gridley v. Gridley*, 24 N. Y. (10 Smith) 135, 136. See *Denman v. Prince*, 40 Barb. 213, 217, 218, 219; *Kingsland v. Braisted*, 2 Lans. 17, 30. So in replevin, if the property claimed could not be described with the requisite certainty, a court of equity alone could give the desired aid. An action of account is a common-law remedy, but if the taking of an account is important, the powers of a court of equity are far more desirable than the common-law action.

A set-off could not be made available at common law, but for a long time past this defect has been remedied by the statute. Before these statutes a court of equity alone was the proper forum to resort to in such cases.

An action for the recovery of dower is given by the common law, but there were superior advantages for the widow if she applied to a court of equity, in her comparatively helpless condition, and for the advantage of being better able to ascertain in what estates she had a right of dower. The same principles were applicable to cases in partition, or in setting out boundaries. These, and other similar cases which might be mentioned, seem to show that many remedies are common to both courts of law and of equity, and that each court has some advantages over the other in the administration of the law; and if this outline shall serve to render the subject more clear to the student, the object in view will have been attained.

(447) The general features of legal actions having been noticed in the last note, the subject of equitable actions will be considered.

Courts of equity act on the person independently of damages as a remedy. There is no feature of relief or remedy afforded by the courts of a higher value than that of acting directly upon the person of the party who would deliberately violate his contracts, or invade

the possessions of another. The relief given by a court of equity may be described as of a positive character, giving the specific thing which the parties are entitled to, while actions at law, with few exceptions, give only the negative remedy of compensation by damages for a deprivation or violation of the true right.

Wherever possible, equity takes care that a right shall be actually enjoyed, and with this view will interfere to prevent a violation of that right. A court of law will not interfere till the violation be effected. It, for instance, will, when a breach of covenant in a lease or in a contract between land owners has been committed, give damages for the breach; but a court of equity will do no more—it will anticipate the event, and restrain a person who merely shows an intention to break his covenants. Or, to take another example illustrating the beneficial result obtained by such ready interference, damages will be given in the one court if a man has been carrying on a trade in some particular locality in violation of his contract with another man not to do so. But these damages, which will only be given for past acts of trading, are, it may be, of small value as a remedy compared with the effectual relief which the other court gives by prohibiting the trade, on pain of imprisonment. The two kinds of justice which may be obtained, the one strictly remedial, the other preventive, in respect of the violation of continuing rights, are clearly different in kind; one is legal, the other equitable; and neither of the two courts will usurp the functions of the other.

A clear illustration of the advantages of an equitable remedy over that afforded by a common-law court may be seen in the case of compelling a party to convey lands which are situated in another State. *Gardner v. Ogden*, 22 N. Y. (8 Smith) 827; *Fenner v. Sanborn*, 87 Barb. 610; *Bailey v. Ryder*, 10 N. Y. (6 Seld.) 363; *Newton v. Bronson*, 18 N. Y. (3 Kern.) 587. And yet a common-law action will not lie here for a trespass upon real estate lying in that State. *Watts v. Kinney*, 6 Hill, 82; *Hurd v. Miller*, 2 Hilt. 540; *Mott v. Coddington*, 1 Abb. N. S. 290; 1 Rob. 267; Wait's Code, 24, 25, 26.

In such case the court has no jurisdiction, unless the person to whom its orders or decrees are addressed is within the reach of the court or amenable to its jurisdiction. The person must be not only within the reach of the court as to locality, but he must have such a character as shall render him personally amenable to the jurisdiction.

The fact that the orders and decrees of the court operate immediately upon persons has had the effect of giving the court a very extensive jurisdiction. As a consequence of this rule, the court may exercise jurisdiction quite independently of the locality of the act to be done, provided the person against whom relief is sought is within the reach and amenable to the process of the court. In exercising the jurisdiction, the court does not lay any claim to the exercise of judicial or administrative rights in a foreign country, but proceeds solely on the circumstance that the person to whom the order or decree is addressed is within reach of the court.

Equity compels the performance of acts specifically. Another branch of the same kind of positive relief is the power which the court exercises of compelling the specific performance of agreements. A man may be indirectly compelled to carry out his contract by the fear of being mulcted in damages by a court of law, in the event of his failing to do so; but another and often a desirable mode, is to insist upon his performing the duty which he owes under the contract by putting him in prison till he does so.

Rights which are recognized and protected, and wrongs which are redressed by common-law courts, are called legal rights and legal injuries; rights which are recognized and protected, and wrongs which are redressed by courts of equity, are called equitable rights and equitable injuries. The former are said to be rights and wrongs at common law, and the remedies, therefore, are remedies at common law; the latter are said to be rights and wrongs in equity, and the remedies, therefore, are remedies in equity.

The distinction between courts of common law and courts of equity will be better understood by considering the different natures of the rights they are designed to recognize and protect, the different natures of the remedies which they apply, and the different natures of the forms and modes of proceeding which they adopt to accomplish their respective ends.

In all strictly common-law courts, there are certain prescribed forms of action to which the party must resort to furnish him a remedy; and, if there be no prescribed form to reach such a case, he is remediless; for these courts do not entertain jurisdiction except in certain

actions, and they give relief according to the particular exigency of such actions, and not otherwise. In those actions none but a general and unqualified judgment can be given, which is either for the plaintiff or for the defendant, without any adaptation of it to particular circumstances.

There are, however, many cases in which a simple judgment for either party, without qualifications, or conditions, or peculiar arrangements, will not do entire justice to either party. Some modifications of the rights of both parties may be required; some restraints on the one side or on the other, or, perhaps, on both sides; some adjustments involving reciprocal obligations, or duties; some compensatory or preliminary, or concurrent proceedings to fix, control or equalize rights; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights, or the redress of injuries.

In all these cases, courts of common law cannot give the desired relief. They have no forms of remedy adapted to the objects. They can entertain suits only in a prescribed form, and they can give a general judgment only in the prescribed form. Hence by their very character and organization they are incapable of furnishing the remedy which the mutual rights and relative situations of the parties, under the circumstances, positively require.

But courts of equity are not so restrained; although they have prescribed forms of proceeding, the latter are flexible, and may be suited to the different postures of cases. They may adjust their decrees so as to meet most, if not all, of these exigencies; and they may vary, qualify, restrain, and model the remedy, so as to suit it to mutual and adverse claims, controlling equities and the real and substantial rights of all the parties. Nay, more; they can bring before them all parties interested in the subject-matter, and adjust the rights of all, however numerous; whereas courts of common law are compelled to limit their inquiry to the very parties in the litigation before them, although other persons may have the deepest interest in the event of the suit. So that one of the most striking and distinctive features of courts of equity is, that they can adapt their decrees to all the varieties of circumstances which may arise, and adjust them to all the peculiar rights of all the parties in interest; whereas courts of common law are bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff, or for the defendant.

Equity restrains the commission of wrongful acts. Courts of equity possess a power of restraining the person in relation to particular acts, which is not only a useful but most efficient remedy. The principle upon which the court acts is, that whenever damage is caused or threatened to property, admitted or legally adjudged to belong to the plaintiff, by an act of the defendant, admitted or legally adjudged to be a civil wrong, and such damage is not adequately remediable at law, the inadequacy of their remedy at law is a sufficient equity, and will warrant an injunction against the commission or continuance of the wrong. And though damages cannot be given in equity for the plaintiff's loss, yet, in some cases, if the defendant has made a profit, he will be decreed to account.

The equity is not confined in principle to any particular acts; those in respect of which it is most commonly enforced are five in number, viz.: waste, destruction, trespass, nuisance, infringement of patent right, and infringement of copyright.

There are three incidents connected with this equity which ought to be mentioned. The equity attaches only on an admitted or legally adjudged right in the plaintiff, admitted or legally adjudged to be infringed by the defendant; it prohibits the continuance as well as the commission of a wrong; and it extends to an account of the defendant's profit.

The relief afforded in equity is either remedial or preventive. The court either grants positive and affirmative relief, or restrains the doing of acts which are against equity and conscience. In giving remedial relief, the court usually proceeds by decree, while preventive relief is administered by injunction.

Equity generally acts without the aid of a jury. The right to trial by jury in common-law actions, as a matter of course and of right, does not exist in courts of equity. It is one of the fundamental rules of equity practice that questions of fact are to be decided by the court without the intervention of a jury. And from the nature of the issues to be tried, and the peculiar equities to be administered, this mode of trial is an advantageous one. In disposing of causes, a court of equity does not always render a final decision at once, as upon the trial of a cause by a jury; for, there may be numerous issues or facts to be investigated, before a final decree can be properly made. If a preliminary decree is proper, it is usually in such cases as the following: 1. That in the course of the suit a dispute has arisen

on a matter of law, which the court is unwilling to decide ; 2. That a similar dispute has arisen on a matter of fact ; 3. That the equity claimed is founded on an alleged legal right, the decision of which the court of chancery declines to assume ; and, 4. That there are matters to be investigated which, although within the province of the court, are such as the presiding judge cannot at the hearing effectually deal with. Adams' Eq. 875. To obviate these impediments the preliminary decree directs : 1. A case for a court of law ; 2. An issue for a jury ; 3. An action at law, to be determined in the ordinary course ; or, 4. A reference to one of the masters of the court, to acquire and impart to it the necessary information. *Ib.* Each of these methods of inquiry may be also adopted on interlocutory applications by motion or petition. *Ib.*

Relief granted or refused as justice requires. The principles upon which the jurisdiction of courts of equity proceed are these : conscience, good faith, honesty and equity. And, in the exercise of its powers, one general maxim in early times was, that chancery would take cognizance of such cases only as were not remediable by the common law. But this jurisdiction was not merely suppletory, it was also corrective. In some cases it gave relief where none could be had at law ; and in other cases it interfered to relieve against proceedings taken in courts of common law.

In equity, the term *conscience* originally embraced those obligations which result when one person is placed in any situation as regards another, that gives the one a right to expect, on the part of the other, the exercise of good faith toward him. The determination of cases according to *equity*, embraced all those instances in which a party, who has not committed any act contrary to good faith or conscience, but who may yet, according to the strict rules of positive law (which may, in their general application, be founded on natural justice), or by the silence of the law in not providing at all for some particular case, have an advantage which it is contrary to the principles of equity that he should enforce or retain. In such cases, a resort was had to the general principles of equity, in the sense of natural justice, which are antecedent to all positive law. In proceedings thus founded upon right, justice and conscience, the court took cognizance of cases in which there was no remedy at law ; and it might also decline to interfere when the claim made was such that a court of equity could not, according to its principles, enforce it ; and, as a result of this system, the court could in many cases grant or refuse the relief sought, according as justice might dictate.

But a court of equity will not in any case allow itself to be made an instrument of injustice. And where a court of equity by its interposition to prevent an act rightfully or wrongfully intended, has caused the loss of a remedy at law, this court will give him a remedy equivalent to that from which the interposition of the court debarred him. *Pulteney v. Warren*, 6 Ves. 78 ; *Brown v. Newall*, 2 M. & C. 558, 572.

Grants relief where the law does not. Courts of equity proceed upon the principle that they will grant relief in those cases in which it ought to be granted according to equity, but where no remedy is given by the common law. This omission may arise in those cases in which the rules of the common law have made no provision for a case like the one presented for adjudication ; or it may be that the rules of practice of the courts of law do not meet the requirements of the particular case, and thus fail to give any remedy, or, a very inadequate one.

The remedial process, the pleadings and practice of courts of equity, are all so framed that the party may obtain every relief consistent with equitable principles. And the final remedial process may be so varied as to meet the requirements of these equities, in those cases in which the jurisdiction of the court exists, by commanding what is right, and forbidding what is wrong, and then enforcing the decree made. A court of equity has jurisdiction in cases of rights, recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law. The remedy must be plain ; for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate ; for if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete ; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time, and in future ; otherwise equity will interfere and give such relief and aid as the exigency of the particular case may require. The jurisdiction of a court of equity is, therefore, sometimes concurrent with the jurisdiction of a court of law ; it is sometimes exclusive of it ; and it is sometimes auxiliary to it.

Equity is governed by settled rules and principles. Courts of equity had their origin in the wants of suitors who failed to obtain a remedy through the aid of common-law courts. And, in many instances, equity gave proper relief when the law courts had no means of affording the desired and needed remedy. In the contest between the courts of law and those of equity, at an early period, it was sometimes said that the latter courts were not governed by settled rules, but acted upon an arbitrary discretionary power. But, waiving that question, it is sufficient to state, that for a long period the powers of these courts, and the rules and principles upon which they proceed, are as well settled as those of the common-law courts.

The object of a court of equity was to afford relief in those cases in which no legal relief was attainable. But it has also been said that it was the business of a court of equity to abate the rigor of the common law; and, while it may be conceded that, in some cases, the interference of a court of equity has had this effect, yet all the rules of the common law which equity has taken upon itself to overrule have long since been well defined, and many of them have ceased, even at common law, to govern the judgments of the courts. The educational course, which courts of equity seem to have furnished to courts of law, has been long so far completed, that no new doctrines in equity opposed to the rules or doctrines of courts of law have been established. Nor does equity, even now, profess to criticise or review decisions of courts of law; moreover, it does not, and never did, interfere to mitigate the severity, where any exists, of rules of positive law. There are, however, some of the early cases in which equity has very nearly, if it has not absolutely, overridden positive law; and those cases relating to the statute of frauds serve as well as any to show how far the power has been exercised.

There are certain principles, on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases as they arise by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles; but the principles are as fixed and certain as the principles on which the courts of common law proceed. *Bond v. Hopkins*, 1 Sch. & Lefr. 428, 429.

This application of existing principles to new cases as they arise is not peculiar to courts of equity; for the common-law courts are daily engaged in adding to the principles of the old jurisprudence, and in enlarging, illustrating and applying legal maxims and rules.

Equity devises new remedies. The numerous cases in which equity interfered and granted relief where none was given before has given rise to the opinion that courts of equity devise new remedies. When it is said that equity grants relief, while at law the complaining party was remediless, it might seem like a new remedy; and yet, it will be remembered that such relief was in accordance with well-settled principles of equity. But, even if it were assumed that courts of equity did, at an early day, exercise the power mentioned, it must be remembered that this court is now as much controlled by general laws as any other court. And while it is proper that all courts should freely exercise their powers for the advancement of justice, it is the part of wisdom and of safety for all courts to keep clearly within the limits of their jurisdiction; and, if additional powers are required, to leave that matter with the legislature.

Mode of relief differs more than principles of law. The law speaks but one language, for all courts, in reference to the legal rights of the parties involved in a litigation. But, in matters of mere practice, there is a wide difference between courts of equity and those of law, and, in many instances, it is the sole difference to be considered by the party seeking to have his rights determined by a court.

The matter of the last two notes was mainly taken from the first volume of Wait's Practice.

[* 53]

*CHAPTER V.

THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY.

IN the course of tracing the history of the Court of Chancery as a court with equitable jurisdiction, it has been inevitable that we should occasionally refer to some of the principles of equity which govern its decisions. The subject is, however, worthy of some further notice. But since equitable jurisprudence, as now established, is of so vast and yet refined a character that it would be wholly impossible, within the limits of this work, even to trace to its source each leading principle, much less follow the course of decisions in all the various ramifications into which those principles spread, we must be content, abandoning the historical method, with an endeavour to exhibit a general outline of the present jurisdiction of the court, and the nature of the relief granted, and we shall afterwards give a short account of the mode in which, by suit and other proceeding, that jurisdiction is exercised.

Although the nature of equitable jurisprudence is now defined by rule and precedent with very considerable exactness (*a*), so that cases do not frequently occur in which there is any serious dispute whether or not this court ought to assume jurisdiction in exclusion of that of common law courts, yet it is by no means easy—or rather we may say it is impossible—to give any general description or definition which shall at once be brief, intelligible, *and even approximately accurate. Such an attempt has often been made, never with a satisfactory amount of success.

Thus it has been said (*b*) that it is the business of a court of equity in England to abate the rigour of the common law; and, undoubtedly, there have been cases where equitable interference has had this effect; but all the rules of common law which equity has so taken upon itself to overrule have long since been well defined, and many of them have ceased, even at common law, to govern the judgments of the court (*c*). In illustration of this, and as an instance of a change in rules of law, due to the establishment of equitable doctrines, we may mention what has taken place as to penal bonds. Bonds appear to have originally been invented to evade the absurd law prohibiting the taking of interest for money lent. If a debtor failed to repay the principal money and interest, since judgment could not be given for interest, the penalty might, with some show of justice, be demanded specifically. And courts of law held this. Unfortunately, they continued to act upon this view after the payment of interest became legal; and even after the statute 37 Hen. 8, c. 9, had declared the debt to be the “just and true

Equitable jurisprudence is definite, yet not easily defined with brevity and accuracy.

Attempted definitions.

Equity abates the rigour of the law.

Equitable doctrine of penalties adopted by courts of law.

(*a*) See *Bond v. Hopkins*, 1 Sch. & Lef. 428.

(*b*) Lord Kames' *Princ. of Equity*, 44.

(*c*) In addition to the case mentioned in a former note and in the text we may add those ancient and now obsolete rules referred to by Lord Campbell, as instances of “absurdities of common law judges,” viz., that

no action could be maintained, or a claim founded, upon a deed detained in the hands of another; and that if a deed of grant were lost, the thing granted was lost with it; that a man was liable to pay money due by deed twice over, if on payment he omitted to take an acquittance under seal.

intent" of the parties to the contract, they refused to consider the payment of principal, interest, and costs, as a full satisfaction of the bond. Now, it is clear that the object of parties in an ordinary case of a bond is not to provide the penalty as a compensation for default, but to secure that default should not be made. If, * therefore, after default in the strict performance [* 55] of the duty contracted for, and in respect of which the penalty is imposed, the defaulter can substantially place the other party in as good a position as if no default had occurred, which may often happen, it is unfair and harsh to enforce the penalty. Accordingly, equity interfered in aid of the obligor (d). Similar remarks apply to the forfeiture of mortgaged lands, because the only object of a mortgage is a security for the repayment of money with interest, and therefore a forfeiture of the lands ought not actually to take place until it is proved, in the most definite manner, that the money cannot be repaid. These equitable principles, after long being acted upon in the Court of Chancery, were, like several others (e), at last forced upon courts of law by the legislature (f).

The educational course which thus, it seems, courts of equity have furnished to courts of law has been long so far completed that no new doctrines in equity opposed to the rules or doctrines of courts of law have been established. Nor does equity even now profess to criticise or review decisions of courts of law; moreover, it does not, and never did, interfere to mitigate the severity, when any exists, of rules of positive law.

For instance, it never was the business of the court of equity to relax the law which formerly existed in this country that lands descended to the heir free from any liability to the simple contract creditors of the ancestor; or the rule that a father or other ancestor should never succeed to the lands of his son; or, again, the rule by which a half-brother was postponed in the inheritance of land to a remote relation of the whole blood. These rules were unquestionably unjust, and have been abrogated by the * legislature; but until the interference of that authority they were [* 56] the law of the land, and, as such, observed as well by courts of equity as other courts, "*hoc quidem per quam durum est, sed ita lex scripta est*" (g).

The law of primogeniture, as it obtains in this country, is not looked upon with favour in other countries, and in the opinion of many is not well founded in justice, yet no one would think for a moment of urging any argument as to its injustice in a court of equity. In such cases equity not only does not pretend to override law, but expressly and professedly follows the law. Nevertheless, even this must not be stated entirely without qualification. There have been a few cases where, if equity has not absolutely put an end to positive law, it has shot not much short of that mark. The most remarkable of these is the manner in which courts of equity have dealt with the Statute of Frauds. This was an enactment of the greatest benefit to society, yet it left a wide door open to the very vice of fraud which it was intended to exclude, an instance of the extreme

(d) Portia need not, in a court of equity, have quibbled to save Antonio from Shylock's knife. The argument would, however, have been there scarcely so dramatic as Shakespeare has given it.

(e) Another instance is the doctrine of set-off, as to which see *ante*, p. 18.

(f) 4 Anne, c. 16; 7 Geo. 2, c. 20.

(g) Ulpian, ff. 40, 9, 12.

difficulty attending all human arrangements. This door equity has boldly shut by disregarding the statute. The statute says that no action or suit shall be maintained on any agreement relating to lands, or of certain specified kinds, unless it is in writing signed by the party to be charged by it. Yet it is in every day's practice to relieve in such a case, if the party seeking relief has by part performance of the contract, or in some other manner, been put into a situation which renders it against conscience for the other to insist upon the want of writing as a bar (*h*). (448)

Relief against
Statute of
Frauds.

(*h*) The earliest case of the kind is *Foxcroft v. Lyster*, 2 Vern. 456; Coll. Parl. Ca. 106. Subsequent books of reports abound in cases of this kind. A very curious case, involving much discussion on the question as to the extent to which equity would go, occurred recently. It was sought to extend the relief to the case of a verbal promise by a man to a woman whom he was about to marry, that he would leave her, by will, her own property; the marriage took place, but the promise was not fulfilled. It was held by Lord Cranworth, whose judgment was afterwards assented to by the House of Lords, that the widow could obtain no relief. *Caton v. Caton*, L. R. 1 Ch. 187; 2 H. L. 127.

(448) In this country the question how far courts of equity will enforce oral or parol agreements for the sale of lands has been frequently presented for adjudication. And the specific performance of such contracts has generally been decreed, if the facts of the case were such as to warrant the decision. The determinations of the courts, however, are not founded upon the fact that an oral agreement for the sale of land can be enforced as a valid contract; but upon some ground of fraud in the particular transaction in question.

There is one general rule which seems to be generally recognized and enforced by the courts of this country; and that is, when there has been an oral agreement for the sale of lands, and the purchaser has gone into possession of the lands in pursuance of the agreement, and has made such improvements, or done such other acts in relation to the lands that it would operate as a fraud upon him if the contract of sale were not carried into effect, a court of equity will decree a specific performance of the contract by the vendor, to prevent the perpetration of a fraud upon the purchaser.

It is such cases as will operate as a fraud upon the purchaser if the contract is not carried into effect that the courts enforce by specific performance. Taking possession of lands by a vendee, under a parol agreement, and in compliance with its terms, accompanied by other acts which cannot be recalled so as to place the vendee in the same situation he was in before taking the possession, will be sufficient to require a specific performance of the contract by the vendor. *Lowry v. Tew*, 3 Barb. Ch. 407, 413; *Dickerson v. Chrisman*, 28 Mo. 184; *Keatts v. Rector*, 1 Ark. (1 Pike) 891, 418, 419; *Eaton v. Whitaker*, 18 Conn. 222, 229; *Tilton v. Tilton*, 9 N. H. 885, 891; *Malins v. Brown*, 4 N. Y. (4 Comst.) 403, 407; *Harsha v. Reid*, 45 N. Y. (6 Hand) 415, 419; *Edwards v. Fry*, 9 Kans. 417; *Clayton v. Frazier*, 38 Texas, 91.

But nothing will be considered a sufficient part performance to take the case out by the statute, unless the acts done by the vendee put him into a situation which will be a fraud upon him in case the agreement is not fully performed. *Ib.*; *Peckham v. Barker*, 8 R. I. 17, 22, 23; *Cuppy v. Hixon*, 29 Ind. 522; *Glass v. Hulbert*, 102 Mass. 24, 28, 44; 3 Am. Rep. 418; *Gilbert v. Trustees of East Newark Co.*, 12 N. J. Eq. (1 Beasl.) 180; *Meach v. Stone*, 1 D. Chip. 182. The rules upon this subject are admirably stated by BULLOCK, J., in *Peckham v. Barker*, 8 R. I. 22, 23, "Courts of equity may enforce the specific performance of parol contracts, notwithstanding the statute of frauds, when followed by part performance, and, although the exercise of the power in each case rests not in the arbitrary, but in the sound judicial discretion of the court, regulating their action by the settled rules of equity, they do not hesitate to exercise it, and grant reliefs, when the contract can be specifically enforced, and when the injured party, in the faith of the contract, has gone into possession, and especially if he has made improvements, so that no damages to be recovered at law for a breach of the contract, would afford adequate redress. But the contract set up must be fair and equal, as distinguished from a hard and unconscionable bargain, entered into by both parties deliberately and intelligently, free from fraud or misapprehension; otherwise, it might be more inequitable to enforce it than to leave parties to their remedies at law. And, if the contract rests in parol, all its substantial conditions of parties, subject-matter,

Again, the *means which courts of equity have sanctioned, of charging lands by a simple deposit of deeds relating to them, is as near to a repeal of the statute as can well be imagined (i). (449) Another instance where equity has made some not inconsiderable inroad upon a rule of positive law occurs in reference to the Registration Acts (k). These statutes require that all incumbrances upon lands in the counties to which they relate shall, in order to be supported as against subsequent dealings, be registered. Equity has, however, modified this rule, to the extent of determining that where the person dealing subsequently has notice

(i) Lord Eldon appears to have thought this, and often commented on *Russell v. Russell*, 1 Bro. C. C. 269, the earliest case in which it was allowed. See *Ex parte Coming*, 9 Ves. 115.

(k) For Middlesex, 7 Anne, c. 20; for the West Riding of Yorkshire, 2 & 3 Anne, c. 4; 5 Anne, c. 18; and for the East Riding and Kingston-upon-Hull, 6 Anne, c. 85; and for the North Riding, 8 Geo. 2, c. 6.

consideration, time, and part performance, should be established as alleged; and with so much of certainty as to leave no doubt, not only what the terms of the contract are, but that the acts of performance relied upon, whether the entering into possession, the payment of money, or the making of improvements, or all of them, were really done on the faith of the contract, and in pursuance, and only in pursuance, thereof." A reference to some of the authorities sustaining these views will be given.

That the acts done must have been done solely with reference to the performance of the contract, and not for other views or purposes. See *Peckham v. Barker*, 8 R. I. 17, 22; *Wood v. Thornly*, 58 Ill. 464; *Lester v. Kinns*, 37 Conn. 9; *Knoll v. Harvey*, 19 Wis. 99; *Rillingslea v. Ward*, 33 Md. 48; *Jacobs v. Peterborough & Shirley R. R.*, 8 Cush. 224; *Shepherd v. Shepherd*, 1 Md. Ch. Dec. 244.

A wrongful entry into possession of the land, as a trespasser, or otherwise, and not in pursuance of the contract, or under it, will not be sufficient to take the case out of the statute. *Purcell v. Miner*, 4 Wall. 518, 518.

The court will require proof that the acts were done in reference to the contract, that they were clear and definite; and, also, that the contract shall be established by sufficient evidence, and in relation to all material terms of it; for, if such terms are uncertain, or ambiguous, or are not sufficiently established, a specific performance will not be decreed. *Shropshire v. Brown*, 45 Ga. 175; *Wood v. Thornley*, 58 Ill. 464; *McClintock v. Laing*, 22 Mich. 212; *Nichols v. Williams*, 22 N. J. Eq. 63; *Tierman v. Gibney*, 24 Wis. 190; *Charnley v. Hansbury*, 18 Penn. St. 16, 21; *Lester v. Kinne*, 37 Conn. 9; *Waters v. Howard*, 8 Gill. (Md.) 277; *McNeill v. Jones*, 21 Ark. 277; *Johnson v. Johnson*, 16 Minn. 512; *Chambers v. Livermore*, 15 Mich. 381; *Pendleton v. Dalton*, Phill. Eq. (N. C.) 119.

A specific performance will not be decreed when nothing more is to be effected than the mere payment of money; it must appear that an award of damages would fail to compensate the plaintiff. *Richmond v. Dubuque, etc., R. R. Co.*, 33 Iowa, 423; *Marble Co. v. Ripley*, 10 Wall. 339.

(449) In some of the States of the Union a deposit of title deeds as a security for a loan of money, or for an antecedent debt, is regarded as an equitable mortgage, which may be enforced by a court of equity. *Holm v. Wust*, 11 Abb. N. S. 113; *Rockwell v. Hobby*, 2 Sandf. Ch. 9; *Williams v. Stratton*, 10 Smedes & Marsh. 418; *Welsh v. Usher*, 2 Hill's Eq. (S. C.) 169, 170; *Jarvis v. Dutcher*, 16 Wis. 307, 315, 316; *Griffin v. Griffin*, 18 N. J. Eq. 104; *Gothard v. Flynn*, 25 Miss. 58; *Chase v. Peck*, 21 N. Y. (7 Smith) 581, 584; *Mounce v. Byars*, 16 Ga. 469; *Hackett v. Reynolds*, 4 R. I. 512.

While in other States such deposits are not held valid as mortgages. *Meador v. Meador*, 8 Heisk. (Tenn.) 562; *Probasco v. Johnson*, 2 Disney (Ohio), 96; *Vanmeter v. McFaddin*, 8 B. Monr. 485; *Shits v. Dieffenbach*, 3 Penn. St. 233; see also *Bicknell v. Bicknell*, 31 Vt. 498, where the question was noticed, but not decided.

The proof of the deposit as a security ought to be clear and satisfactory. *Bowers v. Johnson*, 49 N. Y. (4 Sick.) 432, 434.

of the prior incumbrance, he shall give effect to it, whether registered or not (*l*). (450)

It is certainly a most righteous principle (*m*), that a person who has notice of the just claim of another shall not avail himself of any formal defect in the title of that other so as to oust his rights, yet, in the cases to which we now refer, to uphold this principle is almost to infringe a rule *juris positivi*.

Equity corrects the imperfections of common law whenever there are relations existing between the parties which the common law is unable to take cognizance of, and yet which materially affect their mutual rights and duties; for instance, suppose a man, knowing that he has a good title to land in the possession of another, allows him [* 58] * to expend money upon it, and then ejects him; and that he then brings an action for mesne profits, here common law could not allow a set-off in the action of the money expended, yet the action would be unjust without such allowance; a court of equity would, in such a case, interfere (*n*).

Conscientious dealings between parties connected together by some relation of confidence is enforced, notwithstanding legal rights.

In the case of accounts between partners, a court of common law will not entertain an action by a man against his partner; to supply this omission, then, is the province of a court of equity. (451) Similar cases arise between coexecutors, and corporators. Again, actions of general account are quite admissible, yet the form of an action is very inconvenient for the investigation of complicated accounts; although, therefore, a court of equity is not the proper tribunal for a mere money demand, yet, from its power to investigate intricate facts, it has long exercised jurisdiction in cases of complicated accounts (*o*);

Accounts between partners, &c.

Complicated accounts.

(*l*) *Neve v. Le Neve*, Amb. 436; *Davis v. Strathmore*, 16 Ves. 419; *Tunstall v. Trappes*, 8 Sim. 801. As between persons who claim *in invitum*, and not by contract, such as judgment creditors, notice is immaterial. *Benham v. Keane*, 8 De G. F. & J. 318.

(*m*) See Dig. lib. 4, tit. 3.

(*n*) *Cowder v. Lewis*, 1 Y. & C. 427.

(*o*) The great facility for references of actions to arbitration under the Common Law Procedure Act, 1854, may perhaps now diminish the number of suits in equity founded upon complicated accounts.

(450) The doctrine of notice and its operation in favor of the prior unrecorded incumbrance equally applies throughout the United States. See *Farnsworth v. Childs*, 4 Mass. 687; *Hewes v. Wiswell*, 8 Greenl. (Me.) 94; *Rogers v. Jones*, 8 N. H. 264; *Forrest v. Warrington*, 2 Desauss. 254; *Roads v. Symmes*, 1 Ohio, 281; *Cambridge Village Bank v. Delano*, 48 N. Y. (3 Sick.) 326.

But if one affected with notice conveys to another without notice, the latter is as much protected as if no notice had ever existed. And a purchaser with notice may protect himself by purchasing the title of another *bona fide* purchaser for a valuable consideration without notice. *Bumpus v. Platner*, 1 Johns. Ch. 213; *Jackson v. Given*, 8 Johns. 137; *Schafer v. Reilly*, 50 N. Y. (5 Sick.) 61, 68; *Webster v. Van Steenberg*, 46 Barb. 211; *Ely v. Wilcox*, 26 Wis. 91; *Church v. Ruland*, 64 Penn. St. 432; *Bracken v. Miller*, 4 Watts & Serg. 102. It seems, however, that a tenant in common with notice cannot avail himself of his co-tenant's want of notice on deriving title from him by partition. *Blatchley v. Osborn*, 38 Conn. 226. See more fully, *ante*, vol. 1, 619, note 296.

(451) It is a general rule that suits at law cannot be sustained between partners. So there can be no suit at law between firms having a common member. *Green v. Chapman*, 27 Vt. 286; *Burley v. Harris*, 8 N. H. 235; *Portland Bank v. Hyde*, 2 Fairf. (Me.) 196; *Eastman v. Wright*, 6 Pick. (Mass.) 320; *Graham v. Harris*, 5 Gill & J. (Md.) 489; *Rogers v. Rogers*, 5 Ired. Eq. (N. C.) 81; *Englis v. Furniss*, 4 E. D. Smith, 587; *Haven v. White*, 39 Ill. 509. See 1 Wait's Pr. 669.

quently occurs. It comes oftener within the province of a court of equity, acting as it does in the administration of property, to give constructions to [* 60] executory instruments, such as wills, agreements for settlement, * and the like; and in doing this, judicial liberality in the interpretation of language is often very largely called into play, but no rule of interpretation peculiar to the court is ever contended for (s). For instance, suppose a deed of settlement purporting to be made in pursuance of articles does not carry into effect what a court of equity would construe as the intention of the articles, a court of law adheres to the construction of the deed, and disregards the articles (t); and so also would a court of equity, so long as no proceedings have been taken to reform the settlement (u), even though the case was such that a court of equity would, probably, in a suit instituted for the purpose, reform the settlement (x).

It has also been said (y) that FRAUD, ACCIDENT, and TRUST, are the proper and peculiar objects of a court of equity. This, again, is an inaccurate view to give of the subject, because, although under these three heads fall a very large number of the cases which require the interference of a court of equity, yet they fail in being a basis of classification, for courts of law have power to deal, and do deal, with numerous cases which also involve these same elements.

Another definition that fraud, accident, and trusts are peculiar objects of equity.

Insufficiency of the definition.

Fraud is equally cognizable, and equally adverted to, in a court of law, as in a court of equity, and therefore cannot *simpliciter* be claimed as a foundation of jurisdiction. (454) Again, formerly there were divers strict rules of legal procedure, such as that requiring profert of an instrument constituting the foundation of an action, which were not dispensed with, even though the non-profert was explained on some reasonable ground of accident; for instance, that a deed had been lost, or [* 61] was in the hands of a person who * refused to produce it, and consequently it was necessary to resort to equity to obtain a relaxation of such rules. But since courts of law have so far modified their rules as to make due provision for these difficulties, it has resulted that accident rarely now forms a satisfactory reason for equitable interference: and in most cases, where the jurisdiction is allowed to exist at all, it is merely because, having been once acquired, it cannot be afterwards lost or abandoned. (455) Of those few cases which, resting upon the ground of accident,

Accident.

(s) See remarks of L. J. Knight Bruce upon the construction of documents in *Key v. Key*, 4 De G. M. & G. 84, adhered to in *Ware v. Watson*, 7 ib. 259.

(t) *Doe d. Daniel v. Woodroffe*, 10 M. & W. 608.

(u) *Hammond v. Hammond*, 19 Beav. 29; *Holliday v. Overton*, 15 Beav. 480.

(x) *Bold v. Hutchinson*, 25 L. J. Ch. 598.

(y) 1 Roll. Abr. 374; 4 Inst. 84; 10 Mod. 1.

(454) See *Jackson v. King*, 4 Cow. 207; *Jackson v. Myers*, 18 Johns. 425; *Wakeman v. Dalley*, 51 N. Y. (6 Sick.) 27; S. C., 10 Am. Rep. 551; *Mayne v. Griswold*, 8 Sandf. 463, 479; S. C., 9 N. Y. Leg. Obs. 25.

(455) In the case of lost bonds the jurisdiction of courts of equity affords relief more complete, adequate and perfect than can be done by courts of law. *Carter v. Jones*, 5 Ired. Eq. (N. C.) 196; *Deane v. Dortch*, 5 id. 381; *Allen v. State Bank*, 1 Dev. & B. Eq. (N. C.) 1.

Where a mortgage upon land to secure personal support had been accidentally lost, it was held competent for a court of equity to decree the execution of a new mortgage. *Lawrence v. Lawrence*, 42 N. H. 109. But see *Hoddy v. Hoard*, 2 Carter (Ind.), 474. So it is

are such that relief can still only be obtained in a court of equity, we may mention, as an example, that of a defective execution of a power. Defective execution of a power. If a man, having a power to appoint a fund, and intending to execute it, does so by will, when, perhaps, the power requires a deed, or where some other formalities in executing the power, not of the essence of the act, have not been observed, these are accidental circumstances which render the execution of the power bad at law; yet equity has always, if there was some good moral reason for supporting the execution of the power, such as to provide for payment of debts, or the support of wife or children, been ready to interfere and establish the execution of the power (z). It may here be noticed that equity has never ventured to correct a defective execution of a will, the mode of executing that particular instrument being one to which the legislature has paid especial attention; and though, through the accidental ignorance of an intending testator, he may fail to carry out his intention, this is an irremediable accident, and rightly so, for reasons sufficiently obvious. (456)

As to trusts, the relation of trustee and beneficiary, or *cestui que trust*, is, when a trust technically so called exists, no doubt peculiarly within the jurisdiction of a court of equity, but there are many cases substantially of trust which are cognizable in courts of law; for instance, deposits and all manner of bailments, and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use, which is the ground of an action on the case almost as universally remedial as a bill in equity. (457) And there are cases where courts of law take notice even of trusts, commonly so called; for instance, a court of law allows an executor or administrator to retain for a debt owing to a trustee under a trust of which the executor or administrator is the *cestui que trust* (a).

All these descriptions of equity, then, as distinguished from law, in our system of administration of justice, are, as we see, inaccurate and incomplete; and yet, to no inconsiderable extent, they assist the mind in comprehending what portion of the whole area of justice is taken possession of by the Court of Chancery. For equity does, in each department of natural justice indicated by these descriptions, go farther, and take a wider and less restricted view than courts of law do, and so it is

The above inaccurate definitions contain some truth.

(s) *Chapman v. Gibson*, 3 Bro. C. C. 229; *v. Thompson*, Willes, 186; *Loane v. Casey*, 2 Tollet v. Tollet, 2 P. W. 489. W. Black. 935. See further on this subject (a) *Roakeley v. Godolphin*, Raym. 488; S. *Thompson v. Thompson*, 9 Price, 464; *De C. 2 Show. 403*; and *Skinner*, 214; *Marriott Tasted v. Shaw*, 1 B. & A. 664.

held that where a deed containing an error reformable in equity is lost, the execution of a new and correct deed may be decreed. *Hudspeth v. Thomaston*, 46 Ala. 470.

As to relief in equity in case of a lost note, see *Hopkins v. Adams*, 20 Vt. 407; *Ross v. Wright*, 12 Ga. 507; *Crawford v. Summers*, 3 J. J. Marsh. (Ky.) 800; *Bridgford v. Masonville, etc., Co.*, 84 Conn. 546.

(456) In cases of defective execution of powers, a court of equity will (unless there be some countervailing equity) interpose, and grant relief in favor of a purchaser (*Schenck v. Ellingwood*, 3 Edw. Ch. 175), creditors (*Dennison v. Goehring*, 7 Barr. [Penn.] 175), a wife, a child, and a charity; but not in favor of the donee of the power, or a husband, or grandchildren (*Porter v. Turner*, 3 S. & R. [Penn.] 108), or remote relations, or strangers generally. 1 Story's Eq. Jur., § 95. See *Kearney v. Vaughan*, 50 Mo. 284; *Stewart v. Stokes*, 33 Ala. 494.

(457) See 1 Story's Eq. Jur., § 60; 2 id., § 1256.

able to approach somewhat nearer to that complete and perfect result, the attainment of which is scarcely to be hoped by the most sanguine.

In a court of equity, many actions, not criminal in themselves, nor even done with a wrong intention, are scrutinised, and often disapproved of and set aside, when to impugn them in a court of law would be impossible. (458) There have been cases, indeed, in which equity has been thought to have gone too far in attempting to enforce a scrupulous adherence to conscientious dealing, and the rules of the court have consequently been relaxed in this respect (b).

Fraud in the eye of this court may exist without moral fraud.

[* 63] * When there are dealings between persons standing in a relation of confidence to one another, or so connected that one is liable to be under the influence of the other, the court most jealously watches over and controls their transactions, and readily interferes to prevent any abuse of the confidence, and prevent any undue exercise of the influence so existing. The exact limits of this jurisdiction, which has frequently and justly been said to be of the most salutary kind, have advisedly never been defined, but "it cannot be too freely applied either as to the persons between whom, or the circumstances in which, it is applied" (c). It extends to "all the variety of relations in which dominion may be exercised by one person over another" (d). It would lead us too far if we were to follow this principle into all the numerous relations to which it has been applied, for bills to set aside transactions of this character are of daily occurrence; the commonest classes of cases are those where the transactions are between parent and child (e), guardian and ward (f), solicitor and client (g), and surgeon and *patient (h): it may be added, that if the benefit be conferred upon third parties who have taken no part in the transaction, and are therefore innocent of all fraud, still they will not be allowed to retain that which comes through a polluted channel (i). (459)

Dealings between persons connected by confidential relations.

(b) This has recently been the case as to the rule of the court, that a purchaser of a reversion bears the burden of proving that he gave full value. See 31 Vict. c. 4, which enacts, s. 1, that no purchase made *bona fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall be set aside merely on the ground of undervalue.

(c) *Per* Sir G. Turner, in *Billage v. Southree*, 9 Hare, 540. See, also, *Tate v. Williamson*, L. R. 2 Ch. 55; *Rhodes v. Bate*, L. R. 1 Ch. 252.

(d) *Per* Sir S. Romilly, *arguendo* in *Huguenin v. Baseley*, 14 Ves. 28; and see *Dent v. Bennett*, 4 M. & Cr. 277 (where Lord Cottenham approves of Sir S. Romilly's proposition); *Norton v. Rally*, 2 Eden, 286, where an annuity granted by a woman in a state of religious delusion to her spiritual adviser was set aside. In a very recent case of *Lyon v. Home*, L. R. 6 Eq. 655, large gifts by a woman, im-

pressed with the belief of spirits, to the person who represented himself as the "medium" of communication with her late husband's spirit, was set aside.

(e) *Cocking v. Pratt*, 1 Ves. 401; *Wright v. Vanderplank*, 2 K. & J. 1; *Hoghton v. Hoghton*, 15 Beav. 278. The cases of this class, which are very numerous, extend to a person who has placed himself *in loco parentis*; *Archer v. Hudson*, 7 Beav. 551; and as to elder and younger brothers, see *Sercombe v. Saunders*, 34 Beav. 382.

(f) *Hylton v. Hylton*, 2 Ves. 549; *Hatch v. Hatch*, 9 Ves. 292.

(g) *Proof v. Hines*, Ca. t. Tall. 116; and see Lord Brougham's judgment in *Hunter v. Atkins*, 3 M. & K. 135. As to the relationship of counsel and client, *ante*, p. 24.

(h) *Billage v. Southree*, 9 Hare, 544.

(i) *Bridgman v. Green*, Wilm. 58, 64; 2 Ves. 627.

(458) See *Warner v. Daniels*, 1 Wood. & Min. 108; *Bullock v. Narrott*, 49 Ill. 62; *Baker v. Kline*, 106 Mass. 61; *Waddingham v. Loker*, 44 Mo. 182.

(459) As to transactions between parent and child, see *Slocum v. Marshall*, 2 Wash. C. C. 397; *Taylor v. Taylor*, 8 How. (U. S.) 201; *Brice v. Brice*, 5 Barb. 533; *Jenkins v. Pye*, 12 Peters (U. S.), 258; *Leddel's Exr. v. Starr*, 5 C. E. Green (N. J.), 274; *Comstock v. Comstock*, 57 Barb. 453. Between other family relations, see *Sears v. Shafer*, 6 N. Y. (2 Seld.) 268; *Boney v. Hollingsworth*, 23 Ala. 690; *Hewitt v. Crane*, 2 Halst. Ch. (N. J.) 159, 631; *Turner*

Notwithstanding the willingness of the court to exercise this control over the consciences of men, great caution is observed not to encroach upon the functions properly exerciseable by other courts; and a remarkable case of the refusal of the Court of Chancery to interfere is that of *Allen v. McPherson (k)*, where the House of Lords, sitting as a court of appeal from the Court of Chancery, held that the court would not after probate set aside a will obtained fraudulently and by undue influence.

From what we have shown, it will be observed that equity does in no inconsiderable measure fulfil the popular notion entertained of it, that it aims at complete justice irrespective of any legal quibble or technical difficulty. Still, it must carefully be borne in mind, that the court is slow at the present day to convert any moral doctrine which has not already been made a ground of equitable jurisdiction, into a principle of equity. We pass on now to another and wholly distinct ground which has been occupied by the court, and where it has brought within the range of its influence a large field of jurisdiction.

The court from the earliest times has adopted a mode * of giving relief, different in its nature from that which is usually given by courts of law, and this has drawn within its cognisance a vast series of cases where the suitors think that the relief in a court of law is inadequate to their wants. The relief given by the Court of Equity may be described as of a positive character, giving the specific thing which the parties are entitled to, whilst actions at law, with a few exceptions (l), give only the negative remedy of compensation by damages for a deprivation or violation of the true right. (460)

(k) 1 H. L. Ca. 191. It will be observed that the decision was made by three lords (Lords Lyndhurst, Brougham and Campbell) who were more particularly versed in common law, against the opinions of two others (Lords Cottenham and Langdale), who were equity judges. See the discussion in *Hunt v. Hunt*, 81 L. J. Ch. 161, where a husband was restrained from suing in the Divorce Court for restitution of conjugal rites, contrary to his covenants in a separation deed;

and the very recent case, *Springhead Spinning Co. v. Riley*, L. R. 6. Eq. 551.

(l) Actions of ejectment, trover, *quare impedit*, and dower (retained by 3 & 4 Will. 4, c. 27) and not of the negative kind; and see *post* for a view of the remedies furnished by common law courts under their powers, as enlarged by recent legislation. There still, however, remain sufficient defects in positive relief furnished by them, to make the statements in the text true.

v. Turner, 44 Mo. 535; *Todd v. Grove*, 33 Md. 188. Physician and patient, see *Crispell v. Dubois*, 4 Barb. 393; *Cadwallader v. West*, 48 Mo. 483. Attorney and client, *Goodenough v. Spencer*, 15 Abb. N. S. 248; *Hovell v. Ransom*, 11 Paige, 598; *Evans v. Ellis*, 5 Denio, 640; *Nesbit v. Lockman*, 34 N. Y. (7 Tiff.) 167; *Bibb v. Smith* 1 Dana (Ky.), 583; *Jennings v. McConnel*, 17 Ill. 148; *Mills v. Mills*, 26 Conn. 213; *Mott v. Harrington*, 12 Vt. 199. Principal and agent, see *Neely v. Anderson*, 2 Strobb. Eq. (S. C.) 263; *Green v. Winter*, 1 Johns. Ch. 27; *Parkist v. Alexander*, id. 394; *McMahon v. McGraw*, 26 Wis. 614; *Torrey v. Bank of Orleans*, 9 Paige, 649. Guardian and ward, *Bostwick v. Atkins*, 3 N. Y. (3 Comst.) 53; *Blackmore v. Shelby*, 8 Humph. (Tenn.) 439; *Sullivan v. Blackwell*, 28 Miss. 737; *Garvin's Admr. v. Williams*, 50 Mo. 306. Trustees and *cestui que trust*, *Dobson v. Racey*, 3 Sandf. 61; *Stuart v. Kessam*, 2 Barb. 494; *Pratt v. Thornton*, 28 Me. 335; *Julian v. Reynolds*, 8 Ala. 680; *Slade v. Van Vetchen*, 11 Paige 21; *Davous v. Fanning*, 2 Johns. Ch. 252. And generally, whenever one party is so situated as to exercise a controlling influence over the will, conduct and interests of another, contracts then made will be set aside, even upon slight evidence of the improper exercise of such influence. *Ingersoll v. Ros*, 65 Barb. 346.

(460) A clear illustration of the advantages of an equitable remedy over that afforded by a common-law court may be seen in the case of compelling a party to convey lands which are situated in another State. *Gardner v. Ogden*, 23 N. Y. (8 Smith) 827; 1 Wait's Pr. 17.

Wherever possible, equity takes care that a right shall be actually enjoyed, and with this view will interfere to prevent a violation of that right (*m*). A court of law will not interfere till the violation be effected. It, for instance, will, when a breach of covenant in a lease or in a contract between landowners has been committed, give damages for the breach, but a court of equity will do more, it will anticipate the event, and restrain a person who merely shows an intention to break his covenants (*n*). Or, to take another example illustrating the beneficial relief obtained by such ready interference, damages will be given in the one court if a man has been carrying on a trade in some particular locality in violation of his contract with another man not to do so. But these damages, * which will be only given for past acts of trading, are, it may be, of small value as a remedy compared with the effectual relief which the other court gives by prohibiting the trade on pain of imprisonment. This positive kind of relief is clearly of great value in these cases; it will even be granted although the parties by their contract have fixed the amount of damages in respect of the breach (*o*).

The two kinds of justice which may be obtained, the one strictly remedial, the other preventive in respect of the violation of continuing rights, are clearly different in kind;—one is legal, the other equitable;—and neither of the two courts will usurp the functions of the other. (461) If the injury complained of be completed, so that compensation alone can be awarded, the court of equity has nothing to do with the case (*p*), although the court now (*q*) can in many such cases award damages in addition to or even, according to its discretion, in substitution for the injunction; yet it will refuse to interfere altogether if a court of law could have given every remedy which the case

(*m*) See, for a strong example, *Lloyd v. London, Chatham and Dover Railway Co.*, 2 De G. J. & S. 568, where the work constructed in violation of the right claimed was a work of public importance.

(*n*) See *French v. Macale*, 2 Dru. & War. 269; *Lord Grey de Wilton v. Saxon*, 6 Ves. 106; *Tulk v. Moxhay*, 2 Ph. 774. The remedy is extended even to restrain an underlessee from committing breaches of covenants in the original lease, of which he is ignorant. *Parker v. Whyte*, 1 H. & M. 167; and even a tenant from year to year of a freehold owner, who had contracted with a previous owner that the land should not be used as a beer-shop. *Wilson v. Hart*, L. R. 2 Ch. 463.

(*o*) *Howard v. Hopkins*, 2 Atk. 371; *Roy v. Duke of Somerset*, *ib.* 190; *Chilliner v. Chilliner*, 2 Ves. S. 528; *Logan v. Wienhold*, 7 Bl. N. S. 1; *Roper v. Bartholomew*, 12 Price, 796; *Hardy v. Martin*, 1 Cox, 26; *City of London v. Pugh*, 4 Bro. C. C. 395, Toml. Ed.; *French*

v. Macale, 2 Dru. & War. 269; *Barret v. Blagrave*, 5 Ves. 555; *Fox v. Scard*, 33 Beav. 327; *Howard v. Woodward*, 34 L. J. Ch. 47; *Long v. Bourring*, 33 Beav. 535; *Coles v. Sims*, 5 De G. M. & G. 1; from which cases it will be seen that the fact of a penalty, or even liquidated damages, being fixed by the parties, is not regarded by the court, if the real intention was that the agreement should be observed. If, however, it appears that the observance of the agreement and the payment for the breach were equally within the intention, then the court will not interfere. See *Woodward v. Gyles*, 2 Vern. 119; *Rolfe v. Peterson*, 2 Bro. P. C. 436, Toml. Ed.; *Ponsonby v. Adams*, *ib.* 431.

(*p*) See cases cited in preceding note, and *Saniter v. Ferguson*, 1 M. & G. 286.

(*q*) Under the recent act, 21 & 22 Vict. c. 27, see as to this act in connection with specific performance, *post*, p. 68, note (*o*).

(461) Where there is a plain and adequate remedy at law, a court of equity will not grant relief. *Coughron v. Swift*, 18 Ill. 414; *Graham v. Roberts*, 1 Head (Tenn.), 56; *Moore v. Torrey*, 1 Tex. 42; *Merrill v. Gorham*, 6 Cal. 41. But if the remedy be doubtful and obscure at law, equity will assert a jurisdiction. *King v. Baldwin*, 17 Johns. 384; *Rathbone v. Warren*, 10 id. 587. By statute, in some of the States, the jurisdiction of courts of equity is confined to cases where there is no plain, adequate and complete remedy at law. See Gen. Stats. Mass., ch. 118. See, also, on subject of inadequacy of legal remedy, *Clouston v. Sherer*, 99 Mass. 209; *Shotwell's Admr. v. Smith*, 5 C. E. Green (N. J.), 79; *Ainsley v. Mead*, 3 Lans. 116; *Pratt v. Pond*, 5 Allen (Mass.), 59; *Segar v. Parrish*, 20 Gratt. (Va.) 672.

admits of (r). On the other hand, courts of law, * though able now under certain circumstances to issue a writ of injunction, will not [* 67] entertain any application when no breach has been committed.

Another branch of the same kind of positive relief is the power which the court exercises of compelling the specific performance of agreements. A man may be indirectly compelled to carry out his contract by the fear of being mulcted in damages by a court of law, in the event of his failing to do so; but another, and often a desirable mode, is to insist upon his performing the duty which he owes under the contract by putting him in prison till he does so; or, as may happen in some cases, to do it for him, of course at his cost. The latter are the courses which the Court of Chancery adopts. If a man agrees to sell land, he will be at the proper stage of a suit in equity, instituted for the purpose, ordered to execute a conveyance, and if he disobeys he will be imprisoned for contempt: or the court will make an order vesting the land having the same effect as if he had executed it (s). By virtue then of the peculiar reliefs which this court is able to give, and which other courts cannot give, the specific performance of contracts forms an important branch of equitable jurisdiction. But it is not every contract that will draw with it an equity to compel its fulfilment. Some contracts are obviously entered into solely for the purpose of making a profit; of this kind are the ordinary commercial contracts for the purchase or sale of goods such as are constantly in the market: in the case of these contracts, if they be broken, damages are all that are or can be required; with these, therefore, equity has nothing to do. (462) Other contracts are of a peculiar nature, involving personal conduct or some similar ingredient, such as to sing at a theatre (t), or write * a book (u), or keep an inn (x), or even build a house (y). It is considered to be [* 68]

(r) *Durell v. Pitchard*, L. R. 2 Ch. 244.

(s) Under the Trustee Act, 1850, see s. 30.

(t) *Lumley v. Wagner*, 1 De G. M. & G. 604; *Kemble v. Kean*, 6 Sim. 383.

(u) *Clarke v. Price*, 2 Wils. 157; and see *Morris v. Coleman*, 18 Ves. 437.

(x) *Hooper v. Brodrick*, 11 Sim. 47.

(y) *Brace v. Wehnert*, 25 Beav. 848; *Taylor v. Portington*, 7 De G. M. & G. 838; *Lytton v. Great Northern Railway*, 2 K. & J. 395.

(462) See *McLaughlin v. Piatti*, 27 Cal. 451; *Scott v. Billgerry*, 40 Miss. 119. But the rule that specific performance will not be decreed of a contract respecting goods and things in action is limited to cases where a compensation in damages would furnish a complete and satisfactory remedy; where the party wants the thing in *specie*, and he cannot otherwise be compensated, a specific performance of a personal contract will be enforced. *Phillips v. Berger*, 2 Barb. 608; S. C. affirmed, 8 id. 527. See *Waters v. Howard*, 1 Md. Ch. Dec. 112; *Yulee v. Canova*, 11 Fla. 9; *McKnight v. Robbins*, 1 Halst. Ch. (N. J.) 229, 642; *Furman v. Clark*, 3 Stockt. (N. J.) 306. So in cases of covenants between landlords and tenants, injunctions in the nature of a specific performance are often decreed; as, for instance, covenants to use the demised premises only for a certain business. *Steward v. Winter*, 4 Sandf. Ch. 587. See *Gilman v. Norton*, 33 How. 373; S. C., 6 Rob. 546; *Agate v. Lowenstein*, 4 Daly, 62. And an agreement not to erect a dam on the defendant's own land may be enforced. *Barnes v. Barnes*, 65 N. C. 261. Likewise agreements to form a partnership, and to execute articles accordingly, may be specifically decreed, although relating exclusively to chattel interests. *Birchett v. Bolling*, 5 Munf. (Va.) 442; *Whitworth v. Harris*, 40 Miss. 483. In such cases, no adequate compensation can be made at law. *Ib.* And on the same ground equity will decree the specific performance of a contract to insure against loss by fire. *Carpenter v. Mutual Safety Ins. Co.*, 4 Sandf. Ch. 408; *Neville v. Merchants, etc., Ins. Co.*, 19 Ohio, 453. See further illustrations, *Bennett v. Abrams*, 41 Barb. 619; *Barkley v. Barkley*, 14 Rich. (S. C.) 19; *Weir v. Mundell*, 3 Brewst. (Penn.) 594. As to cases where

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beyond the power of any court to secure the due performance of such acts by any amount of compulsion (z), and so equity will not decree their performance; nevertheless, in many of even these cases, equity will, indirectly, do much towards securing the due completion of the agreement; for if the contract contain a negative clause correlative to the positive agreement, such as not to sing at any other theatre, or not to write plays for any other theatre, equity will interfere by restraining a violation of the negative clause (a). (463)

(e) For other cases where the question has arisen, see *Kimberley v. Jennings*, 6 Sim. 340 (hiring and service); *Hills v. Croll*, 2 Ph. 60 (purchase of acids); *Dietrichsen v. Cabburn*, 2 Ph. 52 (purchase of patent medicines); *Stocker v. Wedderburn*, 3 K. & J. 393 (promotion of a company); *Ogden v. Fossick*, 32 L. J. Ch. 78 (employment as agent); *Blackett v. Bates*, L. R. 1 Ch. 117 (supply of engine power); *Gervais v. Edwards*, 2 Dr. & War. 80; *Peto v. The Brighton, &c. Railway Co.*, 1 H. & M. 468.

(a) *Lumley v. Wagner*, 1 De G. M. & G. 604; *Morris v. Colman*, 18 Ves. 437. See, also, *Dietrichsen v. Cabburn*, 2 Ph. 52. The question involves many difficulties; see *Brett v. East India, &c. Shipping Co.*, 2 H. & M. 404.

specific performance of agreements for leases was refused on different grounds, see *Hopkins v. Gilman*, 22 Wis. 476; *Myers v. Forbes*, 24 Md. 598; *Gelston v. Sigmund*, 27 id. 834; *McKibben v. Brown*, 1 McCart. (N. J.) 13.

(468) Equity will not enforce a contract for the personal services of an actor (*Ford v. Jermon*, 6 Phila. [Penn.] 6); but will enforce the negative covenants of the contract. *Hayes v. Willio*, 11 Abb. N. S. 167. See 2 Wait's Pr. 59.

Contracts for sale of patent rights may be specifically enforced. *Binney v. Annan*, 107 Mass. 94; *Corbin v. Tracy*, 34 Conn. 325; *Ely v. McKay*, 12 Allen (Mass.), 323. So an agreement for the delivery up of promissory notes was enforced specifically. *Tuttle v. Moore*, 16 Minn. 123.

As to power of a married woman to contract for purchase of real estate and enforce the contract, see *Farley v. Palmer*, 20 Ohio St. 223; *Raymond v. Pritchard*, 24 Ind. 818; *Seager v. Burns*, 4 Minn. 141. As to enforcing contract of sale of her real estate against a married woman, see *Stevens v. Parish*, 29 Ind. 260; *Smith v. Armstrong*, 24 Wis. 446; *Clayton v. Frasier*, 33 Texas, 91.

The specific performance of a contract is a matter not of absolute right, but of sound discretion in the court. *St. John v. Benedict*, 6 Johns. Ch. 111; *Seaman v. Van Rensselaer*, 10 Barb. 83. See *Quinn v. Roath*, 37 Conn. 16; *Fish v. Lightner*, 44 Mo. 268; *McComas v. Easley*, 21 Gratt. (Va.) 23. And courts of equity will not interfere to decree specific performance except in cases where it would be strictly equitable, and in granting or refusing such relief will look, not only at the nature of the transaction, but to the character of the parties. If one is a guardian or trustee, the interest of the ward or cestui que trust will be considered. *Sherman v. Wright*, 49 N. Y. (4 Sick.) 227.

It is almost as much a matter of course for a court of equity to decree a specific execution of a contract for the purchase of lands, where, in its nature and circumstances, it is unobjectionable, as it is to give damages at law, where an action will lie for a breach of the contract. *St. Paul Division v. Brown*, 9 Minn. 157; *German v. Machin*, 6 Paige, 288; *Catchcart v. Robinson*, 5 Pet. (U. S.) 264; *King v. Hamilton*, 4 id. 311, 328; *Cuff v. Dorland*, 50 Barb. 438. But this power is to be exercised under the sound judicial discretion of the court, with an eye to the substantial justice of the case. *Ib.* It is not necessary that the land should be situated within the jurisdiction of the State or country where the suit for specific performance is brought. *Shattuck v. Cassidy*, 3 Edw. Ch. 152; *De Klyn v. Watkins*, 8 Sandf. Ch. 185; *Pingree v. Coffin*, 12 Gray (Mass.), 288; *Brown v. Desmond*, 100 Mass. 269; *Davis v. Parker*, 14 Allen (Mass.), 94; *Matteson v. Scofield*, 27 Wis. 671. If the parties to be affected and bound by the decree reside within such State or country, it is sufficient. *Mead v. Merritt*, 2 Paige, 402; *Sutton v. Fowler*, 9 id. 230; *Massie v. Watts*, 6 Cranch, 148, 158. See *Penn v. Hayward*, 14 Ohio St. 302. And it is held that a party may maintain a suit for the specific performance of a contract to convey land, notwithstanding he may have full remedy at law for recovering the value of the lands. *Schapel v. Hopper*, 40 Barb. 425; *Barnes v. Barnes*, 65 N. C. 261.

This interference will be granted, however, only on condition that the plaintiff who seeks the aid of the court is not himself under any obligation to do any acts of that nature which the court cannot specifically enforce. This is an obviously reasonable condition, for it would be contrary to all the practice of the court to give equitable relief to one over whom the court has not complete control in respect of his correlative duties (*b*).

What we have said shows the general character of contracts which may form the subject of a chancery suit; many nice distinctions have been taken upon the subject (*c*), but into these we cannot here enter. The contracts * we [* 69] have mentioned for the sale or purchase of an interest in land, and also of many kinds of personal property, such as shares in a company (*d*), are instances which are daily before the court. We will only add that where the main provisions of the contract have been of a description such as the court commonly deals with, but some minor accessory term is of a personal nature, the court has in a few instances ordered specific performance of that which can be so decreed, and directed a covenant to be entered into for the rest (*e*).

There are many other instances of this kind of relief by which the court substantially enforces the due observance of rights, by restraining the commission of acts in violation of them, besides cases of contract. Thus, the court will restrain the infringement of a patent of invention (*f*), the counterfeiting of a trade mark (*g*), and the piracy of a copyright (*h*). (464)

(*b*) See cases in preceding notes.

(*c*) See *Onions v. Cohen*, 2 H. & M. 354; *Blackett v. Bates*, 35 L. J. Ch. 324; *Kay v. Johnson*, 2 H. & M. 118. The act before referred to (21 & 22 Vict. c. 37), which gives the court power to assess damages, extends to cases of specific performance, and therefore has no inconsiderable bearing upon the course of the court. See *Soames v. Edge*, John. 669; *Norris v. Jackson*, 1 J. & H. 399. The act does not extend the jurisdiction to cases not previously within it. *Wicks v. Hunt*, John. 880; *Ferguson v. Wilson*, L. R. 2 Ch. 17.

(*d*) *Paine v. Hutchinson*, L. R. 3 Ch. 388; *Beane v. Wood*, L. R. 5 Eq. 9. The court will not enforce specifically agreements for the sale of ordinary stock, which can any day be purchased at the market price. *Cuddee v. Rutter*, 5 Vin. Abr. 538, pl. 21. See notes to this case in 1 White & Tudor's L. C. 640.

(*e*) See *Wilson v. West Hartlepool Railway*, 2 De G. J. & S. 475; *Onions v. Cohen*, 2 H. & M. 354.

(*f*) Suits of this kind are of daily occur-

rence, and scarce a volume of modern reports could be found not containing many.

(*g*) In *Blanchard v. Hill*, 2 Atk. 484, Lord Hardwick deprecated the interference of courts of equity in these cases; nevertheless it is now well established. *Croft v. Day*, 7 Beav. 84; *Hall v. Barrows*, 33 L. J. Ch. 204; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. 523; *M'Andrew v. Bassett*, 33 L. J. Ch. 561; see also *Maxwell v. Hogg*, L. R. 2 Ch. 307. The ground upon which the court has proceeded in these cases of trade marks has been much in dispute, but it seems to be founded upon a right in the nature of property. See *Leather Cloth Co. v. American Leather Cloth Co.*

(*h*) *Walcott v. Walker*, 7 Ves. 1; *Kelly v. Morris*, L. R. 1 Eq. 697, where the defendant was restrained from copying directly, although *ex necessitate rei* another work on the same subject, if correct, must give identical information, and see *Scott v. Stamford*, L. R. 3 Eq. 718; and as to publication of private letters, *Gee v. Pritchard*, 2 Sw. 402.

Specific performance will be enforced only when the agreement is mutual, and the tie reciprocal. *Evans v. Gordon*, 49 N. H. 444; *Billingslea v. Ward*, 33 Md. 48; *Jones v. Noble*, 3 Bush (Ky.), 694; *Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Meason v. Kaine*, 63 Penn. St. 335.

(464) An author of letters or papers of whatever kind, whether they be letters of business or private letters, or literary compositions, has a property, and an exclusive copyright therein, unless he unequivocally dedicate them to the public, or to some private person; and no person has any right to publish them without his consent, unless such publication be required to establish a personal right or claim, or to vindicate character. *Folsom v. Marsh*,

[* 70] * We have already adverted to the power which the court has assumed of preventing persons from proceeding at law contrary to equity and good conscience; this is done by injunction. (465)

Restraint of action at law on equitable grounds. The court has always declined laying down precise rules as to the limits within which it will keep in exercising the power of granting injunctions, but such limits may now usually be determined with

2 Story's C. C. 100; *Grigsby v. Brockenridge*, 2 Bush (Ky.), 480; 2 Story's Eq. Jur., § 948, note. The unauthorized publication will be restrained by an injunction. *Ib.*

The bringing out and representation upon the stage of a dramatic composition is not such a dedication of it to the public as will authorize others to print and publish it without the author's permission. The manuscript and the right of the author therein are still within the protection of the law, the same as if they had never been communicated to the public in any form. *Palmer v. De Witt*, 47 N. Y. (2 Sick.) 532; S. C., 7 Am. Rep. 480. See *Keene v. Kimball*, 16 Gray (Mass.), 545; *Keene v. Clark*, 5 Rob. 38; *Keene v. Wheatley*, 9 Am. Law Reg. 38.

The adoption by any person of a trade-mark which will mislead the public, or cause his goods to bear the same name in the market as those of his rival, will be enjoined. *Bradley v. Norton*, 38 Conn. 157; *McCartney v. Garnhart*, 45 Mo. 598; *Newman v. Alford*, 51 N. Y. (6 Sick.) 189; S. C., 10 Am. Rep. 588. And the principle upon which trade-marks are protected is not confined to personal property. It applies to a name applied or appropriated to real property, as to a public hotel. *Howard v. Henriques*, 3 Sandf. 725. So in the law of trade-marks there is held to be no distinction between artificial products and those which are natural and spontaneous. *Congress and Empire Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. (6 Hand) 291; S. C., 10 Abb. N. S. 348; *Newman v. Alford*, 51 N. Y. (6 Sick.) 189; S. C., 10 Am. Rep. 588; *Spring Co. v. Spring Co.*, 4 Brewst. (Penn.) 398.

A purchaser of all the partnership property of a firm, on their dissolution, does not thereby acquire the right to use the firm name as a label on his goods, or to advertise himself as the successor of such firm, and will be restrained in so doing. *Reeves v. Denicks*, 12 Abb. N. S. 92. See *Colton v. Thomas*, 7 Phila. (Penn.) 257; S. C., 2 Brewst. (Penn.) 308.

(465) Courts of equity may, and often do, interpose to stay proceedings at law while pending, to stay judgment after a verdict, and to stay execution after a judgment; or, if execution has taken place, to stay the money in the hands of the sheriff; and it is laid down as a general rule which governs the exercise of these powers, that whenever a party, by fraud, accident, or otherwise, has an advantage in proceeding in a court of ordinary jurisdiction, which must necessarily make that court an instrument of injustice, a court of equity, to prevent a manifest wrong, will interpose by restraining the party whose conscience is thus bound from using the advantage he has improperly gained. See *Hibbard v. Eastman*, 47 N. H. 507; *Sperry v. Gibson*, 8 W. Va. 522; *Mar. Ins. Co. v. Hodgson*, 7 Cranch, 332; *Duncan v. Lyon*, 8 Johns. Ch. 356; *Foster v. Wood*, 6 id. 90; *Miller v. McCarr*, 6 Paige, 451; *Taylor v. Gilman*, 25 Vt. 411; *Bibend v. Kreutz*, 20 Cal. 109; *Kent v. Richards*, 8 Md. Ch. Dec. 352; *Kenyon v. Clarke*, 2 R. I. 67. But the court has no right to grant an injunction against a person who is not a party to the suit (*Schalk v. Schmidt*, 1 McCarter [N. J.], 268), except where such person is the mere servant or agent of the party. Nor will courts of equity interfere to stay proceedings in any cases not strictly of a civil nature. See *Columbia County v. Bryson*, 13 Fla. 281. So equity will not enjoin the United States government from prosecuting a suit at law, since the government is not liable to be sued except by its own consent given by law. *United States v. McLemore*, 4 How. 286; *Hill v. United States*, 9 id. 386. And where the defense might have been made at law, equity will grant no relief against a judgment. *George v. Tutt*, 86 Mo. 141; *Harris v. Galbraith*, 43 Ill. 809; *Agard v. Valencia*, 39 Cal. 292; *Menifee v. Meyers*, 33 Tex. 690. It is otherwise, however, if the complainant was prevented from making his defense by fraud or surprise. *Wingate v. Haywood*, 40 N. H. 437; *Devoll v. Scales*, 49 Me. 320; *Seymour v. Miller*, 82 Conn. 402. Irregularity is no ground for relief (*Eyster's Appeal*, 65 Penn. St. 478); and generally, want of jurisdiction is not sufficient ground for relief. *Comstock v. Clemens*, 19 Cal. 77; *Winterfeld v. Strauss*, 24 Wis. 394. But see *Washington v. Barnes*, 41 Ga. 307; *Ricketts v. Hitchens*, 84 Ind. 848.

sufficient accuracy by reference to precedents, a very vast number of which are contained in the reports (i).

Another species of suit, the reason for which very much arises from the power of giving peculiar relief possessed by the court is, where the court, at the instance of the plaintiff, sets aside a completed transaction. (466) If there be good grounds for treating a conveyance of property or other deed or instrument as an improper transaction, and for setting it aside, a court of equity alone has the power to accomplish that result in a direct manner. A court of law is either powerless to deal with the case at all, or at the most possesses inadequate powers. The grounds for setting aside a completed transaction, which usually are some species of fraud, may be pleaded in a court of law; but a plea can only arise as a defence to an action of some kind, and no procedure at law is applicable for commencing proceedings to avoid the effect of a deed upon the ground of fraud. But a bill may be filed praying that a deed of conveyance or other instrument obtained in some improper manner may be set aside, and the rights of parties restored to the state in which they would have been had such deed or other instrument never been executed (k). The general *doctrines of equity, of course, govern the decision in such [*71] suits.

Until recently, there was a numerous class of suits called interpleader suits, or suits for relief from adverse claims. Where a man in the possession of certain goods or money not his own finds himself exposed to the interpleader. adverse claims of several persons, it often happens that he can-

(i) For an early statement of the doctrines adopted by the court, see Lord Ellesmere's judgment in the *Earl of Oxford's Case*, 1 Ch. Rep. 1; and see the cases cited in the notes to that case in White and Tudor's Leading Cases in Equity.

(k) Where a vendor conveys, the price not

being paid, he retains a lien on the land enforceable in this court against the vendee and persons claiming as volunteers, even though the deed contains a receipt for the money. *Mackreth v. Symmons*, 15 Ves. 329; S. C. 1 Wh. & Tudor, 235.

(466) The classes of cases in which courts of equity have jurisdiction to set aside agreements and other instruments, where they are voidable, and not merely void, have been thus enumerated: "First, where there is actual fraud in the party defendant, in which the party plaintiff has not participated. Secondly, where there is a constructive fraud against public policy, and the party plaintiff has not participated therein. Thirdly, where there is a fraud against public policy, and the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand. And lastly, where there is a constructive fraud by both parties, but they are not in *pari delicto*." 1 Story's Eq. Jur., § 695. And see *Seymour v. Delancy*, 3 Cow. 445; *Thompson v. Graham*, 1 Paige, 884. See *Eastman v. Plumer*, 46 N. H. 464. The exercise of this jurisdiction is in the sound discretion of the court, depending upon the special circumstances of each case; and it is held immaterial, upon the question of jurisdiction, that the party seeking the relief has a defense at law to the instrument of which he prays the surrender and cancellation. *McHenry v. Hazard*, 45 N. Y. (6 Hand) 580. See *Insurance Co. v. Bailey*, 13 Wall. 616. As to cases of relief granted on the ground of undue influence, etc., see *Perkins v. Scott*, 23 Iowa, 287; *Hartly v. Estis*, Phill. (N. C.) 167; *Seeley v. Price*, 14 Mich. 551; *Higberger v. Stiffer*, 21 Md. 888; *Sims v. Ferrill*, 45 Ga. 585; *Knelkamp v. Hidding*, 31 Wis. 508; *Walker v. McCoy*, 3 Head. (Tenn.) 103; *Hightower v. Nuber*, 26 Ark. 604. In the cases following, relief was denied: *Thompson v. Gossit*, 23 Ark. 175; *Harshaw v. McCombs*, 63 N. C. 75; *Hestrick's Appeal*, 58 Penn. St. 477. See *Bryan v. Hitchcock*, 43 Mo. 527.

As to the delivery up and cancellation of deeds and other solemn instruments, which are utterly void, and not merely voidable, see *Peirson v. Elliott*, 6 Peters, 95, 98; *Thigpen v. Pitt*, 1 Jones' Eq. (N. C.) 49; *Hamilton v. Cummings*, 1 Johns. Ch. 520; *Mawhorter v. Armstrong*, 16 Ohio, 188; *Fonda v. Sage*, 48 N. Y. (3 Sick.) 173.

not safely take a discharge from any of them, since it is doubtful which of them is properly entitled to claim. In such cases the court gives relief by requiring the several claimants, when brought before it in a suit instituted for the purpose, to interplead, that is, bring their claims to an issue, so as to be decided upon. Formerly, this remedy in equity was alone available for the purpose, but since similar remedies have been given to courts of law (*l*), interpleader suits are less common, being usually confined to cases where the claims are of an equitable nature. (467)

We have seen (*m*) that the Court of Chancery had, as part of its common law jurisdiction, cognisance of a writ of partition in certain cases; and in other cases the old writ of partition issued out of chancery, but was returnable at common law; this writ was originally only applicable to the case of coparceners; it was, in the reign of Hen. VIII, extended to all cases of joint tenancy and tenancy in common, and continued to be occasionally used until abolished by the statute 3 & 4 Will. 4, c. 27, s. 36; but there were many inconveniences attending it, from the inability of courts of law to compel discovery, and to make compensation for inequality in the division of property, which obviously would often be necessary. These reasons led to the adoption of a concurrent jurisdiction by courts of equity, the practical convenience of which led to the disuse and abolition of the writ. (468)

[* 72] * The method of procedure adopted by the Court of Chancery is by issue of a commission to make the partition and adjust the rights of the parties by giving compensation, or owelty, as it is called, where the divided portions of the land cannot be accurately made proportionate to the shares of the several owners; liberty is, however, usually given to the parties themselves

(*l*) 1 & 2 Will. 4, c. 58; 1 & 2 Vict. c. 45; (*m*) *Ante*, p. 83.
7 & 8 Vict. c. 96; 9 & 10 Vict. c. 95.

(467) The nature of the allegations in every bill of interpleader are, 1. That two or more persons have preferred a claim against the complainant; 2. That they claim the same thing; 3. That the complainant has no beneficial interest in the thing claimed; and 4. That he cannot determine without hazard to himself to which of the defendants the thing of right belongs. *Atkinson v. Manks*, 1 Cow. 691, 703. See *Bedell v. Hoffman*, 2 Paige, 200. That the complainant would be indirectly benefited by the success of the parties to the bill of interpleader is not an objection to the bill. *Oppenheim v. Wolf*, 3 Sandf. Ch. 571.

An interpleader suit is proper where a reward has been publicly offered to any one who will furnish evidence to secure the conviction of an offender, and several persons claim to have furnished the evidence, and to be entitled to the sum offered. *Fargo v. Arthur*, 43 How. 193.

Under the New York Code of Procedure, § 122, courts of law may direct an interpleader to settle the rights of conflicting claims to the same property, in such cases as the courts of equity will allow an interpleader bill. See *Hornby v. Gordon*, 9 Bosw. 656; *Dreyer v. Rauch*, 42 How. 22; *McHenry v. Hazard*, 45 Barb. 657. And see, as to similar statutory provisions in other States, *Bates v. Lilly*, 65 N. C. 232; *Nelson v. Gores*, 84 Ala. 565; *Rohrer v. Turrill*, 4 Minn. 407; *Barker v. Swain*, 4 Jones (N. C.), 220.

(468) A court of equity will not entertain a bill for a partition when the legal title is disputed or doubtful, because a court of law is the proper tribunal to determine such questions. The bill may, however, be retained to give opportunity to try the title at law. *Hoffman v. Beard*, 22 Mich. 59; *Hassam v. Day*, 39 Miss. 892; *Hosford v. Marvin*, 5 Barb. 51; *Daniel v. Green*, 42 Ill. 471; *Hay v. Estell*, 8 C. E. Green (N. J.), 251. But see *Burleson v. Burleson*, 28 Texas, 383; *Gourley v. Woodbury*, 42 Vt. 895; *Morenhout v. Hignera*, 32 Cal. 289; *Oliver v. Jernigan*, 46 Ala. 41. A tenant by the curtesy initiate has sufficient title to support the bill. *Riker v. Darke*, 4 Edw. Ch. 668.

to make proposals for the partition, and the court gives its consideration to these. Recently, the benefit of this action on the part of the court has been extended by giving the court power to direct a sale of the property in certain cases instead of a partition, which obviously would often be very advantageous, but previously could not be done without the consent of all concerned, a thing often, through infancy or other disabilities, not to be obtained (*n*). (469)

In some cases, in which a perfect and appropriate remedy exists at law, but the circumstances are such as to give rise to innumerable actions at law, founded upon the same general private right, each of which **Bills of peace.** actions must be separately tried and disposed of, whether such right is a right claimed in favour or against a number of persons, equity will interfere, in order to avoid multiplicity of suits, or to prevent oppressive litigation. (470) Thus, where the amount of a general fine, payable by all the copyhold tenants of a manor, is in dispute (*o*), or where the rights of common to which the tenants are entitled are not entertained (*t*), equity will entertain a suit on behalf of all the copyhold tenants. Another instance of such interference is where the court will restrain a man from continuing to invade a legal right by a series of separate acts, each of which gives rise to an action, but the damages in each case are trivial; thus equity will restrain the infringement of an ancient ferry (*q*). (471) As an instance of the interference of * the court to prevent oppressive litigation, we may mention [* 73] a recent case where the reservoir of a waterworks company burst, thereby causing damage to a very large number of people; a large number of claims was made against the company, all founded upon similar grounds. The company instituted a suit against some of them, for the purpose of determining, once for all, a question which had arisen, upon which turned the validity of the claims. The court entertained the bill as of the nature of a bill of peace, though, perhaps, not strictly so, since the claims were not absolutely identical (*r*).

The last head of jurisdiction, founded upon the character of the relief which the court gives, which we will mention, is the perpetuation of testimony. (472)

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| (<i>n</i>) See 31 & 32 Vict. c. 40. | 2 Anst. 616; <i>Cory v. Yarmouth, &c. Railway Co.</i> , 3 Hare, 593. Compare also <i>Att.-Gen. v. Sheffield Gas Co.</i> , 3 D. M. & G. 304. |
| (<i>o</i>) Story, Eq. Jur. § 856. | |
| (<i>p</i>) <i>Philips v. Hudson</i> , L. R. 2 Ch. 243. | |
| (<i>q</i>) See Vin. Abr. tit. Nuisance, G. 4; <i>Hussey v. Field</i> , 2 C. M. & R. 432; <i>Att.-Gen. v. Richards</i> , | (<i>r</i>) <i>Sheffield Waterworks v. Yeomans</i> , L. R. 2 Ch. 8. |

(469) In most of the United States there are statutes authorizing a sale. See *McCall's Appeal*, 56 Penn. St. 363; *Hickenbotham v. Blackledge*, 54 Ill. 316; *Wilson v. Duncan*, 44 Miss. 642; *Thurston v. Minke*, 32 Md. 571; *Pockman v. Meatt*, 49 Mo. 344; *Loyd v. Loyd*, 23 La. Ann. 231; *Welsh v. Freeman*, 21 Ohio St. 403; *Graham v. Graham*, 8 Bush (Ky.), 334. See subject of partition generally, 5 Walt's Pr. 24, *et seq.*

(470) A *bill of peace*, to prevent litigation at law, is allowed only in case the plaintiff has satisfactorily established his right at law, or where the persons who controvert the right are so numerous as to render an issue, under the direction of the court, necessary to bring in all the parties concerned, and to prevent a multiplicity of suits. *Eldridge v. Hill*, 2 Johns. Ch. 281. See *Alexander v. Pendleton*, 8 Cranch (U. S.), 462, 468; *Polk v. Rose*, 25 Md. 153; *Marmaduke v. Hannibal, &c., R. R. Co.*, 30 Mo. 545.

(471) See *McRoberts v. Washburne*, 10 Minn. 23.

(472) The object of this sort of equitable relief is to preserve and perpetuate testimony, where it is in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. 2 Story's Eq. Jur., § 1505.

Courts of common law only permit the examination of witnesses when an action is at issue, and the evidence must be confined to the issue in such action. It sometimes happens that there is a reasonable certainty of litigation at a future time, yet, from the circumstances of the case, the right to be claimed or defended in such litigation cannot, or does not, form the subject of present proceedings. To take a single instance, a person may be in possession of an estate under a title depending upon a marriage, the validity of which he may have reasonable cause to fear will be disputed, and to support which, if litigation should ensue, the evidence of certain witnesses would be necessary. Now, clearly he, being in possession, can take no proceedings against a possible claimant who does not come forward; if, therefore, he had no means of preserving the evidence in question, there might result a failure of justice, because the other might await the deaths of the witnesses, and then press his claim. It is easy to suggest numerous similar instances. For all these the Court of Chancery has provided a remedy by allowing a bill to be filed to perpetuate the testimony (s). * Nevertheless, it takes every care that this right shall not be abused, as it is obviously not unattended with danger, because witnesses, whose evidence is not to be published until a period which may be subsequent to their decease (t), are, under some temptation, to give interested evidence. If, therefore, by any means the issue can be tried at once, such a suit will not be allowed (u). When the evidence has been taken, it is sealed up until the time comes to use it, and the suit is at an end, for, of course, it never comes to a hearing, and the plaintiff pays the costs.

A modern act (v) has extended the benefit of this proceeding to a case not previously admitted by the court, viz., where a person would, under the circumstances which he alleges to exist, become entitled, upon the happening of some future event, to any honour, title, dignity, or office, or any estate or interest in any property, the title to which cannot be brought to trial before the happening of the event in question. It enables him to file a bill in chancery to perpetuate any testimony which may be material to support his claim. In any such suit, if the crown is interested, the attorney-general is to be made a party in respect of such interest, and in any proceedings in which the evidence taken in the suit is used, no objection shall be taken that the crown was not a party to the suit.

We have hitherto been exhibiting that part of the jurisdiction of the court which, having for its origin the ancient assumptions of power on the part of the early chancellors, although modified or enlarged by subsequent legislation, may be described as its inherent jurisdiction, depending as we see partly upon doctrines of equity, and partly upon the nature of the relief. We have * sufficiently illustrated the various points which the subject presents to enable the reader to form a correct notion of the court's action, and its general extent and character. Those who would trace with greater precision the boundary of the field, must consult more extensive treatises than

(s) See Consolidated Orders, ix. r. 6.

(t) If the witnesses are alive, and in this country, when the issue is actually raised, the evidence taken in the suit is not allowed to be read.

(u) *Lord North v. Gray*, 1 Dick. 14; *Parry*

v. Rogers, 1 Ven. 441; *Pawlett v. Ingre*, 1 Ves. 808; see the recent case of *Ellice v. Roupell*, 32 Beav. 299, 308, 318, where the practice upon these bills was very much discussed.

(v) 5 & 6 Vict. c. 69; and 10 Cl. & Fin. 305.

the present can be. It remains now to mention briefly the particular duties cast upon the court by the legislature, which, though allied in their nature to some of the ordinary proceedings of a court of equity, depend entirely upon their statutory origin for their present existence, so that the powers of the court are limited and defined by the statutes which created them.

Of these duties and powers, the most prominent at the present day are those which the Court of Chancery exercises in winding up public companies. Companies.

The great extension of commercial enterprise in recent times, as developed through the medium of incorporated associations, consisting of numerous individuals, but acting as a single indivisible unit, is unhappily attended by dangers not differing in their nature from those which threaten smaller associations of two or three members constituting a private partnership. The legislature has, it is almost needless in the present day to remark, determined (working according to its habit by tentative measures, set forth in successive acts,) the laws which regulate the formation, the continuance, and what is more to our present purpose, the dissolution of these associations. Under these acts the Court of Chancery has been constituted the tribunal to take charge of the administrative business which the dissolution of a company and the winding up of its affairs involve, whenever that administration requires the intervention of a court of justice (x). Under the principal * act now in force (The Companies' Act, 1862, 25 & 26 Vict. c. 89), [*76] the court entertains in a summary way applications, by petition, to wind up companies, and the collection and distribution of the assets are made under the direction of the court (y). Other duties in connection with the affairs of companies, not being wound up, are also cast upon the court. By the same act, the court has power to rectify the register of members, if the name of any person is without sufficient cause entered in or omitted from the register (z). Also under the later act of 1867 (30 & 31 Vict. c. 131), the court has other duties to perform relative to schemes for reducing the capital of companies. To these we need not refer in detail.

Somewhat analogous to the duties of the court relative to companies generally, are some special provisions made by the legislature for railway companies. Under certain circumstances, schemes for the arrangement of the affairs of these companies, when they are in financial difficulties, may be proposed to the court (a).

Another most important power conferred by the legislature upon the court, is that which it exercises in favour of creditors, for the purpose of enabling them to obtain satisfaction of their debts by sale of the lands of their debtor.

We have elsewhere shown how lands were by slow degrees made available as

(x) See sect. 81 of the Companies Act, 1862 (25 & 26 Vict. c. 89); it will be observed that for a mining company within the jurisdiction of the court of the Stannaries, that court has also cognisance, but not exclusive cognisance. *In re Penhale and Lomax, &c. Co.*, L. R. 2 Ch. 396.

(y) The rules for winding up were issued 11 Dec. 1862.

(z) S. 85. There is some conflict of judicial opinion as to the extent of the jurisdiction

under this section; see *Ex parte Swan*, 7 C. B. 400; *Stewart's Case*, L. R. 1 Ch. 584; *Ward and Henry's Case*, L. R. 2 Ch. 231; *Ex parte Parker*, *ib.* 690; *Head and White's Case*, L. R. 3 Eq. 84.

(a) See 30 & 31 Vict. c. 127. The rules and orders upon which act were issued 24 Jan. 1868. As to what the scheme must provide for, and the powers of the court under the act, see *Re Cambrian Railways*, L. R. 3 Ch. 278.

assets for the payment of debts; and we here only point out, that it is by the aid of this court, that the creditor is able to proceed to the complete remedy, by sale of the lands, which the law allows.

[* 77] * This, in the case of a deceased debtor, was given by the act 3 & 4 Will. 4, c. 104. In the case of a living debtor, there were no means of applying the lands themselves to the purpose of paying debts by a sale of them until the year 1838, when the act 1 & 2 Vict. c. 110, was passed, and then, and for a long period afterwards, the process remained tedious and costly; but now a creditor who has obtained judgment, and taken the lands in execution under a writ of *elegit*, may obtain an order for their sale in a simple and speedy manner by petition to the court (*b*). Upon hearing the petition, the court directs inquiries to be made as to the debtor's interest in the land and his title thereto, and as far as possible conducts the sale in the same way as in the other case, where the lands of a deceased person are sold for the payment of his debts (*c*).

Inasmuch as cases of trust and those relating to infancy are naturally the subjects of the care of the Court of Chancery, any improvements of the law, or facilities for the satisfaction of the wants of society which the legislature might devise, would of course take effect by the agency of the Court of Chancery; accordingly we find that several acts have been passed for the purpose of meeting the specific wants of trustees and infants. By the Trustee Relief Act (12 & 13 Vict. c. 74), trustees may in suitable cases discharge themselves from all responsibility by paying the trust moneys into the Court of Chancery, after which, the court takes upon itself the custody and distribution of the funds exactly as if a suit had been regularly commenced for the purpose (*d*). It may be noticed that this act does not, perhaps, extend the jurisdiction of the court, so much as provide peculiar and abnormal modes of approaching the court. The like may be said of several other modern enactments. The *Trustee Act, 1850 (13 & 14 Vict. c. 60), provides for the appointment of new trustees of a settlement or will, in a summary and expeditious way, without instituting a suit for the general administration of the trust: and a later act (22 & 23 Vict. c. 35, s. 30) allows trustees to ask for and obtain the advice of the court upon matters relating to their trust, without the formalities of a suit.

But the legislature has done more than provide short and inexpensive modes of obtaining the benefits of the court's guidance in those matters relating to administration of property, for it has in several instances given power to the court to do more than it formerly could; it can now actually change the legal right to land or estate, if a trustee refuse to act, or be unknown, or not to be found (*e*).

Closely connected with these statutory provisions facilitating the discharge of their duties by trustees, are those which relate to the custody and management of infants and their property. Infants are, as we have before shown (*f*), peculiarly the care of the court of chancery, representing the sovereign in his

(b) 27 & 28 Vict. c. 112; *Guest v. Colbridge R. Co.*, L. R. 6 Eq. 619.

(c) See ss. 4 and 5, and *Thornton v. Finch*, 4 Giff. 515.

(d) *Re Bloye's Trusts*, 1 M. & G. 488; S. C. sub nom. *Lewis v. Hilman*, 8 H. L. Ca. 607.

(e) 13 & 14 Vict. c. 60, ss. 34, 35, 45, 49.

(f) *Ante*, p. 29.

character of *parens patriæ*. (473) The benefit derived from this care has not been without its share of legislative attention, and accordingly special and enlarged powers have been given to the court.

By the Custody of Infants' Act (2 & 3 Vict. c. 54), a mother of an infant who is in the sole custody or control of the father or his agent, or of any guardian after the father's death, may obtain an order from the court allowing her access to the infant at reasonable times; or, if the infant be within the age of seven years, the court may order the delivery of the infant into her custody until attaining that age.

Again, under an act passed in the year 1855 (18 & 19 Vict. c. 43, commonly called the Infants' Settlement Act), the court may give its sanction to a settlement by an *infant of his or her property in contemplation of marriage; and it provides that a settlement made with this sanction, [* 79] shall be as valid and effectual as if the person executing the settlement were of the full age of twenty-one years. The act is limited, however, in its application to infants who, if males, are of the age of twenty years, and if females, of the age of seventeen years or upwards (g).

In the following year, 1856, another act was passed (19 & 20 Vict. c. 120), which enables the court to authorise leases or sales of any settled estates (h), which the court may in its discretion deem proper to be carried out. This act extended the powers which had been conferred by the legislature upon the court, about twenty-six years previously (by 1 Will. 4, c. 65), enabling the court to authorise leases to be granted of lands of which an infant might be seised in fee or in tail (i).

The object of these acts was to allow advantage to be taken of the discovery of mineral wealth, the improvement of the value of property by the extension of towns and other causes, to obtain which advantage it had previously been common, in the case of large estates, to apply to parliament for private acts, a proceeding through its costliness inapplicable to small holdings.

(g) Section 4.

(h) The settlement is, by section 1, confined to cases where lands are limited for persons in succession. See as to these words, *Re Burdin's Will*, 7 W. R. 711. The act 21 &

22 Vict. c. 77, extends the operation to reversions and to copyholds, and the act is amended by 27 & 28 Vict. c. 45.

(i) See *In re Clarke*, L. R. 1 Ch. 292.

(473) The jurisdiction of a court of equity over the persons and estates of infants is undoubted. See *Lynch v. Rotan*, 89 Ill. 14. This jurisdiction extends to the care of the person of the infant, so far as necessary for his protection and education; and as to the care of the property of the infant, for its due management and preservation, and proper application for its maintenance. *Clark v. Clark*, 8 Paige, 152; *In re Spence*, 2 Phillips' Ch. (N. C.) 247; 2 Story's Eq. Jur., § 1841.

As between husband and wife the former is generally entitled to the custody of the children. See *Com. v. Briggs*, 16 Pick. (Mass.) 208; *People v. Mercein*, 3 Hill, 899; *Mayne v. Bredwin*, 1 Halst. Ch. (N. J.) 454; *Johnson v. Terry*, 84 Conn. 259. See *Baird v. Torrey*, 6 C. E. Green (N. J.), 884; *Ex parte Waldron*, 18 Johns. 419; *Ex parte Schumport*, 6 Rich. (S. C.) 844. But in the United States as in England, by statute or otherwise, this custody may in some cases be given to the mother. See *Thomas v. Thomas*, 5 C. E. Green (N. J.), 97; *State v. Baird*, 8 Id. 194; *Dumain v. Gwynne*, 10 Allen (Mass.), 270; *People v. Mercein*, 8 Paige, 47.

In the United States the subject of the appointment and removal of guardians is generally regulated by statute. As to the removal of guardians, see *West v. Foreythe*, 84 Ind. 418; *Perkins v. Finnegan*, 105 Mass. 501. As to the jurisdiction in chancery to decree a sale of infant's real estate, see *Kearney v. Vaughn*, 50 Mo. 284; *Rivers v. Durr*, 46 Ala. 418; *Faulkner v. Davis*, 18 Gratt. (Va.) 651; *Downin v. Sprecher*, 35 Md. 474.

By another act (25 & 26 Vict. c. 108) trustees having by the terms of their trust powers to dispose of land by sale, exchange, partition, or enfranchisement, may, with the sanction of the Court of Chancery, deal specially with the minerals (*k*).

[* 80] * The legislature has ever been anxious to promote the improvement of property, and has passed several acts with that object; to these we only refer here in order to remark, that whenever the consent or act of an owner of land, or of some interest in land, is necessary, and could not by reason of his infancy or incapacity be otherwise obtained, the court of chancery is empowered, in a proper case, to authorise the act, or give the consent on behalf of such infant or incapacitated person. The authority or consent is obtained upon a simple application by petition (*l*).

So where land in settlement, or belonging to persons under some incapacity to deal with their interest, is compulsorily taken for, or injuriously affected by, some work of public importance, such as a railway, canal, or public building (*m*), the special authority to take or injure which is, of course, derived from the legislature, it is always entrusted to the court of chancery to see that the money paid as purchase-money or by way of compensation, is applied in accordance with the rights of parties to the land taken or affected (*n*).

[* 81] * Charities are, as has already appeared, within the scope of that protection afforded by the court of chancery to persons under disability as to the management of their affairs, and suits in which the attorney-general, as representing the sovereign, is the plaintiff (usually instituted at the relation or instigation of some private individual interested in the welfare of the charity), are common. But besides the jurisdiction of the court to investigate and control the affairs of a charity upon the institution of a suit, the legislature has provided more speedy and inexpensive modes of correcting abuses. By the act, usually called sir Samuel Romilly's Act (52 Geo. 3, c. 101), an application may be made, by the attorney-general acting *ex officio*, or by any two or more persons interested in the charity, with the consent of the attorney-general, to the court, praying for such relief as the nature of the case may require (*o*).

(*k*) This act was passed in a great measure in consequence of the decision in *Buckley v. Howell*, 29 Beav. 546. It will be noticed that several of the acts mentioned in the text confer powers upon trustees and others occupying a fiduciary character, which would be given to them by the settlement or will creating the trust, if prepared by a skilled draftsman having such a knowledge of the nature of the property as might lead him to anticipate its probable requirements. This knowledge, however, is rarely possessed. The writer was acquainted with an eminent conveyancer who, in preparing his own will, purposely abstained from inserting a power to grant mining leases, because he thought it was well ascertained that there were no minerals under his land. Yet not three months elapsed after his death before a coal master offered to take a lease of some coal under the land; and the trustees were compelled to go to the court for power to grant it. In connection with this remedy by act of parliament for imperfect conveyancing, we may here call attention to the act 23 & 24 Vict. c. 145.

(*l*) See the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), amending and consolidating the law relating to the improvement of lands by owners of limited interest.

(*m*) *E. g.* The land forming the site of the new law courts now in contemplation, or land taken for purposes of, or affected by fortification, under the Defence Act, 1860 (23 & 24 Vict. c. 160).

(*n*) The general act which contains the provisions under which this is done is the Lands Clauses Act, 1845 (9 Vict. c. 18).

(*o*) The operation of this act has been extended by judicial interpretation of a rather liberal nature to cases which would hardly appear at first sight to be within its scope; for instance, the authorising the sale of charity lands. See *Re Parkes' Charity*, 12 Sim. 329; *Re Overseers of Eccleshall*, 16 Beav. 297; *Re Ashton Charity*, 22 Beav. 288. The act was passed in consequence of the former act, 43 Eliz. c. 4 (commonly called the Statute of Charitable Uses) having become obsolete and fallen into disuse.

This summary jurisdiction of the court over charities has been much enlarged by the Charitable Trust Acts, 1853, 1855, and 1860 (*p*), which have made provision for most cases which experience has pointed out to require some more effectual or less costly remedy than previously existed. The details of these enactments would be out of place here. (474)

The last of the special powers which have been conferred by act of parliament upon the court of chancery which we need notice, is the control which, by the Attornies' and Solicitors' Act (23 & 24 Vict. c. 127, amending some previous acts), the court exercises over solicitors. *Solicitors have [* 82] always been, and are, considered as officers of the court, and therefore have always been subject to its authority in matters relating to their professional duty; (475) but by the act just mentioned, peculiar facilities are given both to the client, for the purpose of ascertaining that he has been fairly dealt with by his professional adviser, and to the solicitor for obtaining payment of his costs.

(*p*) 16 & 17 Vict. c. 187; 18 & 19 Vict. c. 124; 23 & 24 Vict. c. 186.

(474) As to jurisdiction in chancery over the subject of charities in the United States, see *Vidal, etc., v. Girard's Executors*, 2 How. 127; *Wheeler v. Smith*, 9 id. 55; *Bascom v. Albertson*, 34 N. Y. (7 Tiff.) 584; *Andrew v. New York Bible and Prayer Book Society*, 4 Sandf. 156; *Howard v. American Peace Society*, 49 Me. 288; *Going v. Emery*, 16 Pick. (Mass.) 107; *Baptist Association v. Hart's Ex'rs*, 4 Wheat. 1; *McCord v. O'Chiltree*, 8 Blackf. (Ind.) 15; *Preachers' Aid Society v. Rich*, 45 Me. 552.

A bequest to trustees "to be by them applied for the promotion of agricultural or horticultural improvements, or other philosophical or philanthropic purposes, at their discretion," has been held valid. *Rotch v. Emerson*, 105 Mass. 431. And so has a bequest for the "schooling" of the children of a school district, and for the "poor" of a county. *Heuser v. Harris*, 42 Ill. 425. So of a bequest for the benefit of a "Friends' meeting," it appearing that they applied their funds only to religious worship, schools, aiding the sick, etc., and purchase and repair of burying-grounds. *Dexter v. Gardner*, 7 Allen (Mass.), 248. See *Shotwell v. Mott*, 2 Sandf. Ch. 46. And a devise of real and personal property for "a school-house and school, to be taught by a female or females, wherein no book of instruction is to be used to teach except spelling books and the Bible," has been held valid. *Tainter v. Clark*, 5 Allen (Mass.), 66. But a devise in remainder to the "Infidel Society in Philadelphia, hereafter to be incorporated for the purpose of building a hall for the free discussion of religion, politics," etc., was held invalid (*Zeisewiss v. James*, 68 Penn. St. 465); and a gift to a church is *invalid*, where the land is owned by a business corporation and has never been irrevocably dedicated to religious uses. *Attorney-General v. Merrimack Manuf. Co.*, 14 Gray (Mass.), 586. A gift for "the poor orphans of the State of North Carolina" was held good (*Miller v. Atkinson*, 63 N. C. 587); and it seems, a gift for the benefit or education of "the colored people" of a particular city or State is good. *Ex parte Lindley*, 83 Ind. 367; *Meeting St. Bap. Soc. v. Hail*, 8 R. I. 234; but see *Needles v. Martin*, 83 Md. 609. A devise "for the propagation of the gospel in foreign lands," was held void. *Carpenter v. Miller's Ex'r*, 8 W. Va. 174.

Equity will not permit members of a charitable organization to dissolve and divide the funds among themselves. *Mayor v. Society, etc.*, 2 Brewst. (Penn.) 385; *Matter of New South Meeting House*, 13 Allen (Mass.), 497.

See, generally, on the subject of charities, the statutes of the particular State, in connection with the decisions of the courts made under them.

(475) Where persons standing in a confidential relation make bargains with, or receive benefits from, the persons for whom they are counsel, the transaction will be scrutinized with extreme vigilance, and regarded with the utmost jealousy; and the clearest evidence is required that there was no fraud, influence, or mistake, and that the transaction was perfectly understood by the weaker party. See *Nesbit v. Lockman*, 34 N. Y. (7 Tiff.) 167.

We have thus illustrated, so far as our limits would allow, the subject of this chapter; but there remains one subject which, though not strictly a part of equitable jurisdiction, is so closely allied to it, that it may, with advantage, find its place at the close of a description of the power of the court.

In the same category, of those who, like infants, require a *quasi* parental care, are persons who, being either idiots (*q*) or of unsound mind, are unable

Idiots and lunatics not as such within the jurisdiction of the court of chancery.

to take care of themselves or their property. We have already remarked that the sovereign, to whose care these fall, entrusts the charge to the chancellor. But the care of idiots and lunatics

does not form part of the general jurisdiction of the court of chancery. The master of the rolls and the vice-chancellors have no jurisdiction whatever to interfere with the affairs of a lunatic, which would not be the case if such interference were considered to be part of the inherent jurisdiction of the court, because in that case all applications would be heard in the first instance by one of them. It is convenient, however, in this place, to

The care of them is part of the duties of the lord chancellor.

mention the law relating to lunacy, because, the care of lunatics being part of the lord chancellor's duties (*r*), which duties are shared by the other judges of the court of appeal in chancery (*s*),

[* 83] it is closely allied in its operation, as well as * its nature, with much of the common jurisdiction of the court. Moreover, the court, in the exercise of its general jurisdiction, has, where a small property under its care belonged to a person who appeared to be incapable of taking care of himself, directed that the income should be applied for his maintenance (*t*).

The custody of an idiot and of his lands was formerly vested in the lord of the fee (*u*) (and therefore still, by special custom, in some manors the lord shall have the ordering of idiot and lunatic copyholders (*x*)); but, by reason of the manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the king, as the general conservator of his people; in order to prevent the idiot from wasting his estate; and reducing himself and his heirs to poverty and distress (*y*). This fiscal prerogative of the king is declared in parliament by statute 17 Edw. 2, c. 9, which directs (in affirmance of the common law (*z*)) that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, and shall find them necessaries; and after the death of such idiots he shall render the estate to the heirs: in order to prevent such idiots from aliening their lands, and their heirs from being disinherited. (476)

By the old common law there was a writ *de idiota inquirendo*, to inquire whether a man be an idiot or not (*a*): which must be tried by a jury of twelve

(*q*) An idiot is one who from his birth has shown no signs of reason. It is rarely that any one is legally proved to be an idiot, but rather the conclusion arrived at is that he is a lunatic, or of unsound mind though not from birth.

(*r*) See *ante*, p. 29.

(*s*) The Lords Justices, under a recent act (30 & 31 Vict. c. 87, s. 18) exercise these powers when sitting separately.

(*t*) See Shelford on Lunacy, 214, 2nd edit.

(*u*) Flet. 1. 1, c. 11, § 10.

(*x*) Dyer, 302; Hutt. 17; Noy. 27.

(*y*) F. N. B. 232.

(*z*) 4 Rep. 126. Memorand. Scacc. 20 Edw. I. (prefixed to Maynard's Yearbook of Edw. II.) fol. 20, 24.

(*a*) F. N. B. 232.

(476) As to the history of the jurisdiction in chancery over idiots, lunatics, etc., see *Parson's Merchant's Case*, 3 Daly, 529; 8 C., 11 Abb. N. S. 209. In the several States of the Union the whole care of this unfortunate class of persons is made the subject of statutory regulation, and the statutes of the particular State should be consulted.

men: and, if they find him *purus idiota*, the profits of his lands and the custody of his person may be granted by the king to some subject, who has interest enough to obtain them. This appropriation of property to the use of the crown was long ago considered as a hardship upon private families: * and as early as in the 8 Jac. 1, it was under the consideration of [*84] parliament, to vest this custody in the relations of the party, and to settle an equivalent on the crown in lieu of it; it being then proposed that this and the slavery of the feudal tenures, which has since been abolished, should share the same fate (b). Yet few instances can be given of the oppressive exertion of it, since it seldom happened that a jury found a man an idiot *a nativitate* but only *non compos mentis* from some particular time; which formerly had an operation very different in point of law.

A man is not an idiot (c), if he has any glimmering of reason, so that he can tell his parents, his age, or the like common matters. But a man who is born deaf, dumb, and blind, is looked upon by the law in the same state with an idiot (d); he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas (e).

A lunatic, or *non compos mentis*, is one who has had understanding, but by disease, grief, or other accident, has lost the use of his reason (f). A lunatic is indeed properly one that has had lucid intervals: sometimes enjoying his senses, and sometimes not, and that frequently depending upon the changes of the moon. But under the general name of *non compos mentis* (which sir Edward Coke says is the most legal name) are comprised not only lunatics, but persons under frenzies, or who lose their intellects by disease; those that *grow* deaf, dumb, and blind, not being *born* so; or such, in short, as * are [*85] proved to be incapable of conducting their own affairs. To these also, as well as idiots, the king has always been guardian, but to a very different purpose. For the law always imagined that these accidental misfortunes might be removed; and therefore only constituted the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their disease to their representatives. And therefore it was declared by the statute 17 Edw. 2, c. 10, that the king should provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use, when they came to their right mind; and the king should take nothing to his own use; and if the parties die in such estate, the residue should be distributed for their souls by the advice of the ordinary: of course now (by the subsequent amendments of the law of administration) the residue goes to their executors or administrators.

Formerly, also, there was a writ *de lunatico inquirendo*, upon which persons were ascertained to be lunatics, which was tried much like the writ *de idiota inquirendo*. These writs are now superseded by the modern methods which have been introduced and improved as experience has pointed out the most convenient and beneficial measures to be adopted. At the present time the

(b) 4 Inst. 208; Com. Journ. 1610.

(c) F. N. B. 233.

(d) Co. Litt. 42; Fleta, l. 6, c. 40.

(e) In *Yong v. Sant*, Dyer, 56 a, it was held that one who had become deaf, dumb, and blind by accident, not having been born so, was to be deemed *non compos mentis*. The presumption that a person deaf, dumb, and

blind from his nativity is an idiot, is only a legal presumption, and is therefore open to be rebutted by evidence of capacity. (Chitty's Med. Jur. i. 301, 345.)

(f) *Idiota a casu et infirmitate*. Mem. Scacch. 20 Edw. I. (in Maynard's Yearbook of Edw. II.) 20.

whole care of lunatics is regulated by acts of parliament (*g*), both as to those who are so found, after solemn inquiry or inquisition, and those who, though of unsound mind, have not been so found by inquisition, either by reason of the expectation of their recovery entertained by their friends, or from their not being possessed of any property. Both private madhouses and public [* 86] asylums erected for the various * counties are now visited and inspected by, and subject to, the control of public officers appointed for that purpose (*h*).

When it is necessary to prove a person a lunatic, so that a proper legal control may be exercised over both his person and property, application is made to the lord chancellor, and if allowed by him (or the lord justices of the court of appeal), the inquiry is conducted by certain officers called the masters in lunacy, either with or without the assistance of a jury, according as the lord chancellor may deem fit. As soon as the lunacy has been established, a committee of the person, and another of the estate, are appointed by his lordship, and a scheme is prepared for the management of the person and estate; this, when sanctioned by the judge, regulates the maintenance of the lunatic and the management of his estate. Every change that may be requisite afterwards is only made under an order of the same high authority (*i*).

[* 87]

* CHAPTER VI.

A SUIT IN CHANCERY.

WE will endeavour, in this chapter, to exhibit to the reader a general view of the proceedings in a chancery suit, so as to enable one who is not familiar with the course of the court to understand the principal events which take place, their effects, and relative importance; but it will not be possible, within the limits to which we are confined, to give much account of the numerous rules which require to be observed in conducting the proceedings.

In the course of years, innumerable disputes have, as may be easily supposed, arisen as to procedure, and in order to prevent their recurrence in similar cases, and also to provide for the due management of business, rules General orders of the court. have been from time to time laid down. Some of these, called the general orders of the court, have been promulgated by the chancellor, or more recently by the chancellor and other judges, acting for that purpose under legislative authority (*a*). These, not having been made merely for the purpose of deciding any particular case, are binding upon all the judges. Other rules have become established as rules of practice by being laid down in the course of deciding particular cases, and adopted subsequently by other judges

(*g*) See the following acts :—8 & 9 Vict. cc. 100, 126 (which repealed a number of earlier acts), amended by 16 & 17 Vict. cc. 96, 97; 25 & 26 Vict. c. 111; 26 & 27 Vict. c. 110; and 28 & 29 Vict. c. 80. In these acts the word "lunatic" includes "every insane person and every person being an idiot or lunatic or of unsound mind."

(*h*) See the acts cited in preceding note.

(*i*) See the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), regulating the inquiries and all the other proceedings; and the Amendment Act, 25 & 26 Vict. c. 86.

(*a*) 15 & 16 Vict. c. 86, s. 63; and 23 & 24 Vict. c. 128. See *Short v. Roberts*, L. R. 2 Ch. 13.

as binding precedents. In the year 1852, The Improvement of Jurisdiction of Equity Act (*b*) was passed, and in the year 1860, all the then existing general orders were abrogated, and a new series was issued, which *consolidated and amended the former orders. These enactments and orders, [* 88] with a few subsequent acts (*c*) and general orders and regulations, together with a vast collection of reported cases decided upon points of practice, now constitute the law of the court.

It would be tedious, and it is unnecessary for our purpose, to give any historical account of the various proceedings, when and how they originated, and how they gradually assumed their present form. We shall, therefore, confine our description to the practice as existing at the present time.

A suit in chancery is commenced by filing in the office of the clerk of records and writs in chancery a document called a bill (*d*). (477) This bill, a model of which is given in the schedule of the consolidated orders above referred to, is a petition addressed to the lord chancellor in a particular form. At the head of it appear the names of the parties to the suit, then follows an address to the person holding the great seal, the terms of which are prescribed by the court upon every change of the custody of the seal, or alteration in the style of the person to whom it is committed. The description and address of the plaintiff are then stated. After this is set forth a statement of all the facts and circumstances, and the purport, or sometimes even the words of the documents, upon which the plaintiff intends to rely. In this part is introduced any inference of law or fact which the plaintiff thinks it advisable to state, and there sometimes is added that which the plaintiff conceives will be the defence, together with the matter which he thinks sufficient to avoid such defence. This stating part of the bill is succeeded by the prayer, in which the plaintiff asks for the particular relief *he thinks himself entitled to, always (*e*) concluding with a prayer for general relief. [* 89] The bill must be signed by counsel (*f*). It is printed, and a printed copy is filed (*g*). On it there is an indorsement equivalent to a writ or command from her majesty to the defendant to cause an appearance to be entered in the court (*h*). When the bill has been filed, a copy of it is stamped by the clerk

(*b*) 15 & 16 Vict. c. 86.

(*c*) 21 & 22 Vict. c. 27; 25 & 26 Vict. c. 42; 23 & 24 Vict. c. 149.

(*d*) When the Attorney-General, as representing the crown, is plaintiff, the document filed is called an information, not being a petition. Informations are often, but not always, filed at the "relation" of some person who takes the risk as to costs. They must, however, always be sanctioned by the Attorney-General.

(*e*) Except when the bill is merely to obtain discovery, and not asking for any relief, a bill

which, now that common law courts have the power of interrogating parties, is comparatively rare.

(*f*) Cons. Order, viii. 1.

(*g*) Cons. Order, ix. 3. In cases where time is of urgent importance, a written copy is allowed to be filed; but a printed copy must be filed within fourteen days afterwards. *Ib.* r. 4.

(*h*) For the form of the indorsement, see the schedule to 15 & 16 Vict. c. 86; and Cons. Order, ix. 2.

(477) Under the Reformed Codes of Procedure adopted in many of the States of the Union the distinction between actions at law and suits in equity is expressly abolished, and legal and equitable relief may be asked for in the same action. The first pleading on the part of the plaintiff is the *complaint* or *petition*. See *Bowen v. Aubrey*, 22 Cal. 569; *Dewitt v. Hayes*, 2 id. 468; *Bradley v. Aldrich*, 40 N. Y. (1 Hand) 504; *Clark v. Harwood*, 8 How. 470; *Danforth v. Carter*, 1 Iowa, 548.

As to the mode of commencing cases in equity in Massachusetts, see *Belknap v. Stone*, 1 Allen, 572; in Maine, see *Stephenson v. Davis*, 56 Me. 73, 76.

of records and writs, which is served on the defendant; and if there be more than one defendant, such a copy is served on each. If the defendant be out of the jurisdiction, the court, upon application of the plaintiff, showing where he probably may be found, will order service upon him abroad, giving him a reasonable time to appear (*i*).

If the defendant, having been duly served with the bill, do not enter an appearance, the plaintiff may enter an appearance for him, so as to be able to proceed with the suit. After the appearance of the defendant, the next step, if the plaintiff wishes, as he usually does, to examine the defendant, and thus elicit information in support of his case, is to file (*k*), and then serve interrogatories (*l*), in which the plaintiff puts to the defendant such questions relative to the subject-matter of the suit as he thinks proper (*m*).

[* 90] * When interrogatories have been served, the defendant is bound to answer them within twenty-eight days (*n*), on pain of imprisonment; but the time will be readily extended on application to the court if a sufficient reason be given. The answer to the bill is the statement of the defendant made, on oath, in answer to the interrogatories; it usually constitutes the commencement of the defence to the suit: in it the defendant is bound to reply fully to every question in the interrogatories. But besides these replies, he may also state any facts which he thinks material to his defence. If he have not been interrogated, he may if he pleases, within a limited time (*o*), make a voluntary answer. An answer, like a bill, being an important part of the pleadings, must be signed by counsel; it is, like a bill, printed and filed. An answer is not however the only mode of defence.

If any ground of defence is apparent on the bill itself, either from the matter contained in it, or from some defect in its frame or in the case made by it, the defendant may, instead of answering it, demur to it; and this is then the proper mode of defence. A demurrer is an allegation by a defendant which, admitting for the purpose of argument the matters of fact alleged by the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon, or to oblige the defendant to answer (*p*). The grounds of demurrer are various; the commonest is, that, the subject of the suit is not within the jurisdiction of a court of equity, or, what is much the same thing, that there is not stated in the bill such a case as entitles the plaintiff to any discovery or relief in a court of equity: other grounds are, that the plaintiff is not entitled to sue by reason of some

[* 91] * personal disability, or want of interest on his part; or, although the plaintiff may have an interest in the subject-matter, and may be under no disability, and may have a good title to sue, yet that the defendant is not the proper person to be sued by the plaintiff, either from not having any inter-

(*i*) Cons. Order, x. 7. This order has been, after much discussion, decided to give a general power to the court, as stated in the text. See *Drummond v. Drummond*, L. R. 2 Ch. 33.

(*k*) The interrogatories must be filed within eight days after the time limited for appearance of the defendant who is to be interrogated. Cons. Order, xi. 2.

(*l*) A form of interrogation is given in schedule B. of the Cons. Orders.

(*m*) Usually the interrogatories follow the

bill, and require the defendant to answer seriatim as to the truth of each allegation in the bill, with such additional interrogatories as may be calculated to elicit the truth. It is not essential, however, to follow this course. See *Mareh v. Keith*, 1 Dr. & S. 342.

(*n*) Cons. Order, xxxvi. 4.

(*o*) Fourteen days after the last day for service of interrogatories.

(*p*) Mitford's Pleadings in Chancery, 107.

est in the subject-matter of the suit, or from his not owing any duty to the plaintiff. Another ground of demurrer is, that complete justice cannot be done without other persons than those made parties to the suit being before the court (*q*); and that the bill is therefore defective for want of parties, and ought not to proceed. Another, and the last ground of demurrer which we need here mention, is that of multifariousness. The court will not permit a plaintiff to demand by one bill several matters of different natures against several defendants, or even, where the demands are clearly distinct in their character, against one defendant. A defendant may, therefore, demur to a bill open to this objection (*r*).

When a demurrer is put in to the bill, and the plaintiff does not admit its validity, the case is set down for * argument before the court. If the [* 92] court thinks the demurrer is well founded, the decision is equivalent to a dismissal of the bill, and so terminates the suit as regards the demurring defendant. Sometimes, however, the court, whilst holding the demurrer to be well founded, yet considers the circumstances to be such that it ought not to put an end to the suit, but give the plaintiff an opportunity of making some alteration in the statement of his case. The court then allows the demurrer, but gives leave to the plaintiff to amend his bill. In such case the plaintiff usually has to pay the costs which have been incurred by the defendant up to that time. If the demurrer is, in the opinion of the court, not well founded, it is overruled, and the suit is in the same condition as if it had not been put in, the defendant having, however, generally to pay the costs occasioned by it.

A third method of defence is by plea. A plea is of the nature of an answer to the bill, but is of a special kind, having no reference to any interrogatories which may have been filed. It may be described as a statement

Plea. of some simple ground of defence, which does not appear on the face of the bill, but which would if it were in the bill render it demurrable. The grounds of pleas are very much like those of demurrers. The object of them is to save the expense of examination of witnesses at large; therefore it is not every good defence in equity that is good as a plea, for where the defence consists of a variety of circumstances, it is not proper for a plea, as the court would be giving judgment on the case before it is made out by proof (*s*).

Pleas are not much favoured by the court, and except where the fact pleaded is a bankruptcy of the plaintiff or defendant, taking away the right to sue or liability to be sued, or some other equally simple fact, they are rarely resorted to, and still more rarely succeed.

(*q*) The demurrer for want of parties was formerly a fruitful source of annoyance and expense. This has been much diminished by the alteration made by the legislature in the rules of the court (15 & 16 Vict. c. 86, s. 42; Cons. Order, vii. 1. 2). The old rule, requiring the presence of every person who was materially interested in the subject-matter of the suit, arose from the extreme anxiety of the court to do complete justice, and prevent future litigation. The strictness with which it was applied often led to great practical injustice, from the difficulty and expense of complying with it. This led to its relaxation in several classes of cases, mentioned in the act and the orders.

(*r*) For illustrations of the several kinds

of demurrers, see Mitford on Pleadings, ch. ii. s. 2, p. 1, and also J. W. Smith's Notes thereto. The demurrer for want of equity is the most frequent, that for multifariousness the next. The skill of draughtsmen, however, in preparing bills, renders demurrers not very common; sometimes, however, the plan of filing a bill in order that it may be demurred to, is adopted as a convenient means of quickly obtaining the opinion of the court upon the construction of an instrument, upon which the plaintiff in such a case founds his claim. The parties in such a case usually acquiesce in the decision upon the demurrer.

(*s*) Mitford, 219.

[* 93] * If a plea succeeds, there is an end of the suit; if it fails, the suit proceeds as if none had been put in.

If the defendant, not succeeding in either demurrer or plea, puts in an answer, the plaintiff next considers whether the answer contains sufficient replies to his interrogatories. If it does not, he excepts to the sufficiency of the answer; which is done by filing a formal statement of his objections, called the exceptions. The exceptions, which must show accurately wherein the answer is deficient, are then argued before the court; and if they are allowed, the defendant has to put in a further answer. This process continues until the plaintiff has, in the opinion of the court, obtained a complete answer to his interrogatories.

A plaintiff, after seeing the answer, often finds that the allegations contained in his bill are either incorrect or insufficient fully to exhibit his case to the best advantage. He is allowed at that stage, therefore, to amend his bill by making such alterations in it as he thinks proper, with this restriction only, that he must not by amendment entirely alter the character of the suit.

He may also introduce by amendment any fact which has occurred subsequently to the filing of the original bill (*t*). A bill may be amended at other stages of the suit besides after answer, and the changes which may be introduced by way of amendment are many and various; new parties may be added and former parties struck out; even a party originally plaintiff may be made a defendant; additional relief may be asked, and the former prayer altered. Even at the hearing of a cause in court amendments are allowed; and the hearing will in such a case be postponed for a few days, in order that they may be made (*u*). An order is in every case obtained from the * court giving leave to amend; such an order will, before the defendant has put in his answer, be given as of course (*i. e.* without the defendant being allowed to oppose it), as often as the plaintiff pleases. After an answer has been put in, one order to amend only will be granted as of course, and any further order can only be obtained if the court, after hearing the defendant, thinks proper to allow it.

The plaintiff may file interrogatories, and require an answer to his amended bill if he pleases; these new interrogatories are confined, however, to the subject-matter of the amendments, but the same process for insisting upon a sufficient answer that applied to the original bill is repeated for the amended bill.

If the defendant wishes to examine the plaintiff in the same searching manner in which he has himself been examined, he may do so. Formerly in order to do this, he was obliged to file a second bill, *i. e.* institute a second suit, called a cross suit (*x*), but now a defendant may, as soon as he has put in a sufficient answer (if required to answer), file interrogatories for the examination of the plaintiff, prefixing to such interrogatories a concise statement of the subjects on which discovery is sought. The plain-

(*t*) This was not allowed until the act 15 & 16 Vict. c. 86, s. 53. It could previously only be done by filing a new bill, called a supplemental bill. See Mitford, 62.

(*u*) See *Tasker v. Small*, 3 M. & Cr. 63; *Maughan v. Blake*, L. R. 3 Ch. 32.

(*x*) A cross suit is even now sometimes

necessary for complete defence; for instance, when one defendant wishes to obtain discovery from a co-defendant. The right to file a cross bill is expressly reserved by the statute 15 & 16 Vict. c. 86, s. 19, which first authorised these interrogatories on the defendant's part.

tiff is bound to answer such interrogatories, in like manner as the defendant was bound to answer the plaintiff's interrogatories.

When the defendant has answered in an unexceptionable manner, and the plaintiff no longer wishes to amend his bill, the latter carefully considers the answer, and if he finds that upon the answer alone, without further proof, there is sufficient ground for a final order or decree (which rarely happens in hostile suits), he is bound to proceed * upon the answer [* 95] without entering into evidence (y). In such a case the cause is set down on bill and answer, the answer being assumed in the argument to be true (z).

If, however, the plaintiff thinks, as usually happens, that evidence beyond the admissions in the answer is necessary to support his case, or if the defendant has not been required to answer, and has not answered, then there are two distinct courses open to the plaintiff, which differ in their effects principally as to the mode in which the evidence is taken. The plaintiff may at once put the cause in issue, by filing what is called a replication (a), and is equivalent to traversing or denying *in toto* the statements in the answer. Or he may serve a notice of motion for a decree (b). These two modes of bringing the cause to a hearing we will consider separately, but before doing so it may be here mentioned, that if he has required an answer, but the defendant has neglected to put one in, the plaintiff, besides taking steps to imprison him for contempt in not answering, may file a traversing note, which is a declaration of his intention "to proceed with his cause as if the defendant had filed an answer traversing the case made by the bill" (c).

We will suppose now that the plaintiff has put the cause in issue by filing replication (d), he immediately gives notice that he has done so to the defendant, and each side then proceeds to verify his case by evidence.

In chancery, evidence is for the most part taken by affidavit, that is, by a written statement signed by the witness, to the truth of which he is sworn in the presence of certain officers of the court, (who are usually solicitors), appointed by the lord chancellor, and called "commissioners to administer oaths in chancery," of whom there are a great number residing in all parts of the kingdom. These affidavits when sworn are filed in the record * and writ clerk's office, and copies of them for the use of the parties at the hearing are printed under the direction of the record and writ clerks (e). Sometimes, however, it is necessary, either from the refusal of a witness to make an affidavit, or for some other reason, to compel a witness to give evidence; when this is the case, the examination must of course be *vivâ voce*. The witness is served by the party who desires to examine with a writ of subpoena, to appear before one of the examiners of the court, of whom there are two. He is then examined *ex parte*, no person having a right to be present at such examination except the party producing the witness, his counsel, solicitor, and agents. The examination is put into writing by the examiner, and is then treated as an affidavit (f).

(y) Cons. Order, xix. 1.

(z) *Ib.* 2.

(a) Cons. Order, xvii. 2.

(b) 15 & 16 Vict. c. 86, s. 15.

(c) Cons. Order, xiii. 1.

(d) Cons. Order, iii. 9.

(e) Gen. Order, 16 May, 1862, i.

(f) Gen. Order on Evidence, 5 Feb. 1861, r. 6. This order was made under the authority of an act (23 & 24 Vict. c. 123), passed for the purpose of giving effect to the recommendation of the chancery evidence commissioners.

All the evidence in chief must be taken in the above modes, within eight weeks after issue is joined (*g*), and the cross-examination of all witnesses is taken before the court at the hearing (*h*), unless the witness be, through age, infirmity, or for some other good reason satisfactory to the court, incapable of being so cross-examined (*i*), or unless the parties agree otherwise (*k*).

Besides the above modes of taking evidence, it is competent for any party, within fourteen days after issue joined, to apply for an order that all the evidence, both in chief and on cross-examination, upon some particular issue of fact, should be taken *viva voce* at the hearing (*l*).

[* 97] * When an order of this kind has been made, the hearing, so far as concerns the issue of fact mentioned in the order, very much resembles a trial at *nisi prius* of a common law action, the judge taking both the part of judge and jury: a still greater resemblance, however, is allowed under the recent improvements of chancery practice, inasmuch as the court may, if it thinks fit, summon a jury to try before itself any question of fact which may arise in a suit. This trial by jury, however, will not, unless by consent of counsel on both sides, be directed until the cause has been actually brought to a hearing in the usual way (*m*), and it is completely in the discretion of the court whether a jury shall be summoned or not (*n*).

When the eight weeks allowed for taking evidence in the manner above explained have expired, or when any further enlarged time which the court may have allowed has expired, the evidence (except as to such issue, if any, as is to be tried before the court) is considered to be closed, and the cause is ripe for the hearing. The plaintiff accordingly sets it down in the registrar's book, and it comes on in its turn in court.

On hearing the cause, the court has, whatever may be the state of the evidence, or the mode in which parties have attempted to prove their cases, power to require the production and oral examination of any witness or party in the cause (*o*). This power is wholly discretionary on the part of the court, and will only be exercised with great care, and when the point on which further evidence is wanted is of great importance (*p*).

[* 98] * We come now to the course of preparing evidence in the other case, viz., where the plaintiff moves for a decree. The notice of motion which he must give to the defendant states that one month from its date he will move the court for a decree (*q*). Before serving the notice of motion for decree, the plaintiff must file all affidavits which he thinks material for his purpose, and he must, at the

(*g*) *Ib.* 5.

(*h*) *Ib.* 7. The onus of producing a witness to be cross-examined is thrown upon the party whose witness he is. *Ib.* 19.

(*i*) *Ib.* 11.

(*k*) *Ib.* 10. There is also an exception in the particular case of a suit to perpetuate testimony. *Ib.* 16.

(*l*) Gen. Order, 5 Feb. 1861, r. 8. The introduction of oral evidence in court, either in chief or in cross-examination, is since the year 1860, when the Improvement of Jurisdiction in Equity (15 & 16 Vict. c. 86) to which we have so often had occasion to refer, was passed.

(*m*) *George v. Whitmore*, 28 Beav. 557; *Bradley v. Bevington*, 4 Dr. 511.

(*n*) *Bovill v. Hitchcock*, L. R. 3 Ch. 417; and see *Fernis v. Young*, L. R. 1 H. L. 63, where the principles and practice of the court, under the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), and the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), are fully explained.

(*o*) 15 & 16 Vict. c. 86, s. 89.

(*p*) Only, in fact, in those cases in which formerly the court used to send an issue to be tried by a jury before a common law judge, a practice which no longer exists. *Wilkinson v. Stringer*, 9 Hare, App. xxiii.; *Ferguson v. Wilson*, 86 L. J. Ch. 67.

(*q*) 15 & 16 Vict. c. 86, s. 14; Cons. Order, xxxiii. r. 4.

foot of his notice of motion which he serves upon the defendant, set forth a list of the affidavits which he intends to use at the hearing (*r*). It follows from this, that if the plaintiff wishes to use the evidence of witnesses who refuse to make affidavits on his behalf, he must not proceed in this manner, but must file replication; because, before giving the notice of motion, he cannot subpoena any witnesses, and after doing so he is too late (*s*). On the hearing of a motion for decree, the answer, if there be one, is treated as an affidavit (*t*). When the defendant has received notice of motion for decree, he of course has an opportunity of seeing at the same time the evidence of his adversary, because he can obtain copies of the affidavits from the office. He must then, within fourteen days after service of the notice, file his affidavits in answer to the plaintiff's case (*u*). If he wishes to examine an unwilling witness, he has now an opportunity of doing so; he serves a subpoena on the witness to appear before an examiner of the court (*x*). The examination in this case would, it would * seem, be conducted in the presence of both parties, and the witness would be subject to cross-examination and re-examination (*y*). [**99*]

When the defendant has completed his evidence and filed it, the plaintiff has an opportunity of filing further evidence in reply. Seven days are allowed for this (*z*), after which time no further evidence on either side can be put in to be used on the hearing of the motion for decree (*a*). But if either party wishes to cross-examine any witness whose affidavit has been filed, he may give a notice to the party on whose behalf the affidavit was filed of his desire to cross-examine, and such party must produce the witness before an examiner to be cross-examined, otherwise he cannot use the affidavit without special leave of the court (*b*).

The hearing of the motion for decree in most cases has the same effect as the hearing of the cause (*c*). The court can either make a decree exactly as if the cause had been brought to a hearing by joining issue, or it may dismiss the bill, and so put an end to the suit, to the overthrow of the plaintiff.

On comparing the method of taking evidence just described with that where the cause is brought to issue by replication, we see the great difference between them. When the cause is brought to issue, all * the evidence in chief is put in, without an opportunity being given to either party of seeing the evidence in chief of the other side: but each side, having power to obtain copies of all the evidence on the file, knows, before the hearing, all the

(*r*) *Ib.* and r. 5.

(*s*) *Coles v. Morris*, L. R. 2 Ch. 701.

(*t*) 15 & 16 Vict. c. 86, s. 15.

(*u*) Cons. Order, xxxiii. 6. The time is readily enlarged upon application to the court.

(*z*) This seems to be the effect of 15 & 16 Vict. c. 86, s. 40, as that section appears to apply to the examination of a witness by a defendant, after notice of motion for decree. See *Coles v. Morris*, L. R. 2 Ch. 701; and *Wigan v. Rowland*, 10 Hare, App. xviii.; *Wilhelm v. Reynolds*, 8 W. R. 625.

(*y*) 15 & 16 Vict. c. 86, ss. 31, 40. The words in section 40, that the witness shall be examined "in like manner, as such witness would be bound to attend and be examined with a view to the hearing of a cause," seem

properly to be referred to s. 31, and not to the manner in which, under the later General Order of 1861, witnesses are examined with a view to the hearing of the cause.

(*a*) Cons. Order, xxxiii. 7. It would seem, that at this stage a plaintiff may summon an unwilling witness before the examiner, under 15 & 16 Vict. c. 86, s. 40, but the evidence extracted from him must be strictly in reply to the defendant's evidence.

(*b*) *Ib.* r. 8.

(*c*) Gen. Order, 5 Feb. 1861, r. 19.

(*c*) There have been cases where the motion for a decree has been simply refused, without prejudice to the plaintiff bringing the cause to a hearing by filing replication. *Thomas v. Barnard*, 5 Jur. N. S. 31.

evidence that is to be brought against him, and has an opportunity of considering the course to be adopted as to cross-examination; and he also has the great advantage of that cross-examination being in open court. The only exception to this previous knowledge is where there is to be a trial of an issue of fact before the court with a jury, or before the court sitting as both judge and jury; in which case the trial is, as we have already mentioned, conducted exactly like a trial at *nisi prius*.

In the case of motion for decree, on the other hand, each side has an opportunity of seeing his adversary's evidence before completing his own. There is also usually much less oral examination, and there is none whatever before the court.

We have now arrived at an important point in the history of a suit, that where a decree is made. A few remarks here arise upon the different characters which suits in chancery possess which lead to very different results as to the position which the litigation takes at the time a decree is made and its subsequent history.

There are many suits where the object is to obtain redress for some grievance, and as soon as the grievance is proved, and an order of the court made for its redress, the whole litigation is at an end. In an ordinary action at law, this is nearly always the case. The object for which a man brings an action is damages, and as soon as a verdict and judgment have been arrived at, the plaintiff has obtained everything which the court can give, nothing then remaining to be done in the action except to enforce, by the aid of the sheriff, the execution of the judgment. But in chancery it is often quite different; in a very large number of instances a single order can by no means fulfil the whole requirements of the suitors. It often happens, * particularly in those [* 101] numerous suits where the court undertakes administrative business, that the action of the court must be continued for a great length of time, even for the lifetime of individuals. In these cases the decree, though in some respects the most important order which the court makes, is not the only order, and indeed is often not the order which decides the main questions in controversy between the parties. It often follows, therefore, that when the court makes a decree in accordance with the prayer of the bill, or in accordance with what it considers to be the rights of the parties, there remains still a great deal for the court to decide. The suit has a history subsequent to the decree which is as important as that of the earlier part. We will take two instances as illustrations. Suppose a man dies, leaving a number of debts, and also property: and a creditor thinks it necessary to require the estate to be administered by the court, the prayer which he makes is, that the court shall undertake the administration. The creditor in such a suit only takes care to satisfy the court that he has a claim, and that the persons who are made defendants are the persons in whom, by representation, either as executors or administrators, devisees, or heirs-at-law, the property of the deceased is legally vested.

The decree which is made in answer to such a prayer is that the estate shall be administered by the court; it also gives directions that certain inquiries shall be taken by the court, such as an inquiry what property the deceased was possessed of, where the property is and in whose possession, what debts the deceased owed, and who are entitled to the property subject to the payment of

debts; and it directs that the property be applied in a due course of administration. The decree of course takes various forms to suit the particular circumstances of each case (*d*). It is obvious in this case that the decree is but * the first step towards attaining the object of the suit. After the [*102] decree is made, all questions which arise as to the validity of claims of creditors, the construction of the will, the proofs of heirship, and so on, are decided by subsequent proceedings. Another case, which we may take, does not at first sight so clearly show why a final order may not be made at once. Suppose a mortgagee wish to exercise his right of foreclosing the equity of redemption of his mortgagor, that is, make himself absolute owner of the mortgaged property. It might seem that, if he proves by his evidence that the debt is still owing, and if, before the decree is made, the mortgagor does not pay, a final decree might be made. The court, however, according to its ancient customs, will not do this except in very special cases (*e*), or by consent of the parties. It always requires the accounts to be taken between the parties in a formal manner, and gives the mortgagor a very considerable period (always six months, and usually nine months), after the amount due has been ascertained, to pay the money: and it is only after proof of default in payment at the end of this time that it makes a final order barring the mortgagor from all interest in the property.

It will be seen that in this case the course adopted by the court, arises out of the extreme tenderness of the court in avoiding the slightest appearance of a harsh or oppressive exercise of strict legal rights.

Many other of the various complications which the court introduces into its decrees, also arise from the same anxious desire to do complete justice between the parties, and to insist upon the observance by the plaintiff seeking * the aid of the court, of the duty which he owes to the defendant. [*103] It is with this view, also, that in every proceeding before the court, the costs incurred by the parties are paid in such manner as the court, which has always reserved to itself the most ample discretion upon this point, directs (*f*). A bill is often dismissed without costs, that is, each party has to pay his own costs, even though the plaintiff fails to establish his case: sometimes, even, a victorious party has to pay all the costs of both sides (*g*).

Before describing the course of events subsequent to the decree, we must here revert to the earlier period of the suit, in order to notice certain proceedings which, though often of the highest importance, yet are not part of the regular course of the suit. From what we have seen, it is obvious that in a hostile suit there often may be considerable delay before the cause can be heard and a decree made. It seldom happens in such a suit that the interval is less than three or four months; it is often much longer. But in many cases such

(*d*) The case described in the text is one for which the legislature has recently provided peculiar facilities, shortening the process to be gone through before the decree is made (see 15 & 16 Vict. c. 86, ss. 45 and 47); but the decree, when made, is exactly of the same character as it used to be when the regular course of proceedings was travelled over.

(*e*) *E.g.* if the mortgaged property belong to an infant, and the mortgage debt be more than its value, and it be proved clearly to the court that it would be for the advantage of

the infant that the mortgagee should take the property in discharge of his debt. See Seton on Decrees, 685.

(*f*) Very different from the rule at law, where the defeated party invariably pays all the costs, except in the case of nominal damages.

(*g*) *E.g.* in a simple redemption suit the plaintiff pays all the costs, even though he succeeds in redeeming; though if an improper defence be set up, the defendant will be made to pay any extra costs occasioned thereby.

a delay would be absolutely fatal to the plaintiff's hopes of relief, unless some earlier interference for his protection could be obtained; moreover the parties often require, as we have seen, particular orders relative to the conduct of the proceedings. The court, therefore, permits the parties at any stage of the suit to make applications to it. Such applications are made for various purposes, and may be made in several ways, either by summons obtained at the chambers of the judge, in which case the order is made by the judge in chambers or his chief clerk, after hearing the parties on the day when the summons is [* 104] returnable; or * by motion in court; or, thirdly, by a formal petition addressed to the court.

The summons in chambers is usually adopted only for less important matters, and need not here be dwelt upon. Formal petitions, for matters of any consequence, are rarely presented before decree. Motions are the principal proceedings to which we now refer. A motion is a mere interlocutory application, and is sometimes made without giving any notice to the other side, but usually is made after giving two clear days' notice (*h*).

We do not intend here to enumerate all the different orders which the court will make upon motion; the general principle is, that if time is of such importance that great danger may ensue unless something be done before the cause can come to a hearing, the court will interfere and make such a temporary order as will prevent any such disastrous consequences; taking care, however, as far as possible, that if, upon the more thorough investigation of the facts which the complete evidence given at the hearing allows, it should turn out that the order made upon a motion was wrong, then it can restore the party against whom such order was obtained to as good a position as he was in previously.

If, therefore, the plaintiff asks for some order which may prove detrimental to the defendant, and, according to the evidence furnished upon the motion, there appears a possibility that the detriment so incurred would be an injustice to the defendant, the court will, as a price for its early interference, put the plaintiff upon terms to indemnify the defendant in case of the injustice being proved.

The most common of the important orders asked for on motion, are orders [* 105] for injunctions. A few words may be * said as to these, which will illustrate the proceeding by motion. An injunction is a writ issuing out of the court, commanding the person against whom it is addressed to abstain from doing some specified thing, upon pain of imprisonment for contempt of court. When the injunction is to restrain the defendant from proceeding with an action in a court of law, or some other court, it has been called a common injunction. When it restrains the defendant from doing some specified act, such as cutting down timber, digging mines, infringing a copyright or trade mark, it is called a special injunction. Formerly there was some difference between the practice in respect to the two kinds of injunctions, but now the distinction is unimportant (*i*). An injunction will not, before decree, be granted unless there is a special prayer in the bill for one. When it is intended to move for an injunction, a notice is served upon the defendant,

(*h*) Cons. Order, xxxiii. 2. If an order is obtained without giving notice, the other side may make a motion to discharge it; a motion made upon notice cannot be so discharged,

as the merits are discussed, each side bringing forward its evidence.

(*i*) 15 & 16 Vict. c. 86, s. 58.

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stating that counsel will move the court on a named day, ^{which must be one of the days which are set apart for motions (k). Each side then has an opportunity of filing affidavits in support of or against the motion, and this evidence can continue to be put in until the motion is heard. On the motion days the court asks each counsel in turn, according to seniority (l), whether he moves anything, and thereupon counsel makes the motion in the terms of the notice, and the argument ensues; but there is no previous formality of setting it down with the registrars, as is done when the cause is heard (m).} 25

As soon as the order for an injunction is made, and * notice of it given to the defendant, he is bound to obey it, although the writ itself be not issued till later. [*106]

Injunctions granted on motion before decree will, in accordance with what has been said, only be of a temporary character, generally until the hearing of the cause or further order. Sometimes, however, the discussion on the motion involves the whole merits of the suit; in such a case it is not uncommon for the parties to agree that the motion be treated as the hearing, all formalities being waived. To this the court readily consents, and in such a case a chancery suit may be instituted and ended within the space of a few days.

When there no longer remains any property under the control of the court, and no further question between the parties arising out of the certificates made in the inquiries in chambers, a suit in chancery comes to an end. It often happens, however, that before that consummation of events can be arrived at, proposals are made for a compromise. Of course if all the parties interested are *sui juris*, a compromise may be made at any time without the sanction of the court; but where, as in chancery so often is the case, infants or married women are interested, a compromise of doubtful rights can only be made with the permission of the court. This is given if, after a full disclosure of the facts, the court is satisfied that it will be for the real benefit of the person so under its protection that the compromise should be carried out (n), in which case alone will the compromise be binding.

The proceedings which take place after a decree is made will not detain us long. They consist usually of the following:—first, a prosecution of inquiries into facts, such as pedigrees, titles to property, and accounts. This is done in the chambers of the judges by their chief clerks: except where any point of difficulty arises, when the matter * is brought before the judge himself; for which purpose the judges, *i. e.*, the master of the rolls and the vice-chancellors (not the judges of the court of appeal, for they only sit in court), attend in chambers in the afternoon after the rising of the court. As soon as these inquiries and accounts have been finished, a certificate is made out by the chief clerk stating the result (o). This forms the basis of fact for

(k) Special orders can in proper cases be obtained varying the practice, so as, for instance, to allow a motion to be brought on upon a day not one of the seal days.

(l) On the last day of term it is usual for the court to call upon the utter bar before the queen's counsel.

(m) When an order made on motion is appealed against, a notice of the motion, by way of appeal, is lodged with the registrar, and it appears in the court paper, and is called on by the registrar.

(n) See, for the principles upon which compromises on behalf of infants will be supported or upset, *Brooke v. Lord Mostyn*, 2 De G. J. & S. 373.

(o) As to the form of the certificate, see *Macintosh v. Great Western Railway*, 1 De G. J. & S. 443, in which the taking the accounts had occupied the chief clerk for two days in the week during nearly six years. See S. C. 2 New Rep. 11.

the subsequent steps in the cause, the principal of which is the further consideration. The party who has the carriage of the decree, *i. e.* the plaintiff in many though not all cases, sets down the cause to be heard upon further consideration, and it takes its place in the court paper, and is called on in court in its turn. It is on this second hearing, if we may so term it, that in administration suits the great contest upon the construction of wills or other similar documents takes place. The certificate informs the court of all the persons who can set up any claim; and each person mentioned in the certificate, and having a possible interest, appears at the hearing of the further consideration by his counsel and argues in support of his rights. It is to be noticed, that under the modern practice, a decree may be made in a suit for the administration or protection of property (*p*), with only a few of the persons interested being parties. But the court requires that all persons who by the chief clerk's certificate are shown to have any interest, or possible interest, should be served with notice of the decree, so that they may be bound by the proceedings, and that they may have an opportunity of appearing at the further consideration. A suit cannot in many cases be entirely disposed of even on the further consideration, because it may be * that persons who finally become entitled [* 108] to the corpus of the estate which is being administered, may at that time not even be born. A suit in such cases necessarily remains in a quiescent state for years, the property being, however, retained under the protection of the court. When through the happening of events, such as the deaths of tenants for life, or the attainment of their majority by infants, it becomes necessary again to come to the court for an order; the usual mode of obtaining the order is by the presentation of a petition. A petition, as we have before said, may be presented at any stage of the suit, the most important petitions are those to which we now refer, the object of which is to obtain an order for the payment or transfer of money or stock in the hands of the accountant-general of the court, to which money or stock, by such events as above-mentioned, a new title has accrued to some person, or an order for conveyance of lands under similar circumstances.

Petitions state all the facts fully, though concisely. They are presented to the lord-chancellor (except in the case of one intended to be heard by the master of the rolls when it is presented to that judge), who receives them by his secretary. The petition is indorsed by the secretary with a direction that all parties should attend the court on a day named: this is called answering the petition. A copy of the petition is then served upon all parties interested, and on the proper day it appears in the court paper, and is called on in its turn. It must be supported by evidence which consists either of certificates previously made in the cause, or formal evidence of the facts upon which the title in question depends. The court exercises considerable caution in making the order, and herein consists the great value of an administration by the court (*q*).

(*p*) 15 & 16 Vict. c. 86, s. 42, where rules as to parties are laid down.

(*q*) The court however necessarily relies, to no inconsiderable extent, upon the faith reposed in solicitors, which, when abused, may lead to disastrous consequences. It

therefore requires, under penalty of their being struck off the rolls, the most rigid attention to honourable conduct on the part of solicitors. See *In re Collins*, 7 De G. M. & G. 558.

* We have thus traced the history of a suit through all the stages of its progress: many of these by consent of the parties, or the natural requirements of the case, are often omitted, and the duration of the suit proportionately shortened. It only remains here to notice those cases where, by special legislative enactment, proceedings in chancery are taken either by a shortened form of suit, or by summary application without suit. Where the object of the suit is the administration of the personal estate of a deceased person, or even in certain cases his real estate, a decree for the administration may be obtained without filing a bill, but by a simple summons in chambers served upon the executor or administrator, or a devisee of real estate entrusted by the will with a power of sale (r).

From what we have recently said, in these cases the main value of the proceedings depends upon what takes place after decree, therefore it is a great advantage to avoid the delay and expense of the pleadings and other matters which in a regular suit precede the decree. In most of the other cases to which reference was made in the last chapter (s), the summary application to the court is made by a petition, entitled or headed with the name of the act, and of the name of the subject-matter of the proceeding. The only case in which a summary application of this kind is, according to the practice, made by a simple motion, is where the application is to rectify the register of a joint-stock company, under the 35th section of the Companies' Act, 1862. But sometimes the method of proceeding by summons, for the purpose of originating proceedings, is adopted, as in a case under the Charitable Trust Act, 1853 (t).

*CHAPTER VII.

[*110]

THE SUPERIOR COURTS OF LAW.

FOLLOWING the plan indicated in the three preceding chapters, we shall next consider the superior courts of common law, their jurisdiction, and the proceedings in an action—of which subjects that first mentioned will, in anticipation of organic changes in this part of our system of judicature, be very briefly noticed.

By the ancient Saxon constitution there was only one superior court of justice in the kingdom; and that court had cognisance both of civil and spiritual causes: viz. the *wittena-gemote*, or general council, which assembled annually or oftener, wherever the king kept his Christmas, Easter, or Whitsuntide, as well to do private justice as to consult upon public business. After the Conquest the ecclesiastical jurisdiction was gradually diverted into another channel; and a court was established which sat in the king's hall, thence called by

(r) See 15 & 16 Vict. c. 86, ss. 45, 47. Where the only question is one of construction of a document or of title a special case may be stated under Sir George Turner's Act, 18 & 19 Vict. c. 85.

(s) Pages 79—82.

(t) Cons. Order, xli. r. 10.

Bracton (a), and other ancient authors, *aula regia*, or *aula regis* (b). This court * was composed of the king's great officers of state resident in his palace, and usually attended on his person: such as the lord high constable and lord marshal, who chiefly presided in matters of honour and of arms; determining according to the law military and the law of nations. Besides these, there were the lord high steward, and lord great chamberlain; the steward of the household; the lord chancellor (c); and the lord treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices; and by the greater barons of parliament, who sat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these in their several departments transacted secular business, criminal and civil, and likewise attended to matters connected with the revenue: whilst over all presided one special magistrate, called the chief justiciar (d) or *capitalis justiciarius totius Angliæ*; who was also the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. This officer, from the plentitude of his power, grew at length both obnoxious to the people and dangerous to the government which employed him (e).

The *aula* or *curia regis* being bound to follow the king's household in his progresses and expeditions, the trial of common causes therein was found very burdensome to the subject. Wherefore king John, who dreaded also the power of the justiciar, readily consented to that article which forms the eleventh chapter of *Magna Carta*, and enacts, that "*communia placita non sequantur curiam * regis, sed teneantur in aliquo loco certo.*" This certain place was established at Westminster, where the *aula regis* originally sat, when the king resided in that city; and to this article of the great charter we owe the institution of the court of common pleas, which has ever since remained stationary in Westminster Hall. In like manner, Philip the Fair, king of France, about the year 1302 fixed the parliament of Paris to abide constantly in that metropolis; which before used to follow the person of the king wherever he went, and in which he himself used frequently to decide the causes that were there depending; but all were then referred to the sole cognisance of the parliament and its learned judges. And thus also in 1495, the Emperor Maximilian I. fixed the imperial chamber (which before always travelled with the court and household) to be constantly held at Worms, whence it was afterwards translated to Spire (f). Over the court of common pleas a chief judge and other justices were appointed; with

(a) L. 3, tr. 1, c. 7.

(b) This court (says Mr. Millar, Eng. Gov. vol. ii. p. 108) corresponded in constitution and origin with that tribunal which, after the accession of Hugh Capet, was gradually formed out of the ancient parliament of France. It corresponded also with the Aulic council which, after the time of Otho the Great, arose out of the Diet of the German Empire. There is reason to believe that in every considerable European kingdom the progress of the feudal system gave rise to a similar institution, which became detached from the national council by connivance,

rather than by any positive appointment. The same writer remarks that, although in England the institution of the King's Council is commonly ascribed to William the Conqueror, yet this must be understood with reference to the first appearance of that court as distinct from the legislative assembly, rather than with reference to its final and complete establishment.

(c) *Ante*, p. 83.

(d) *Ante*, p. 86.

(e) Spelm. Gl. 331, 2, 3; Gilb. Hist. C. P. Introd. 17.

(f) Mod. Un. Hist. xxiii. 896, xxix. 467.

jurisdiction to hear and determine all pleas of land, and wrongs merely civil between subject and subject. Which critical establishment of this principal court of common law, at that particular juncture and that particular place, gave rise to the inns of court in its neighbourhood; and, thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy it (*g*).

The *aula regia* being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief justiciar being also considerably curbed by the great charter, the authority of both began to decline apace under the long and troublesome reign of Henry III. And the other several offices of the chief justiciar were under Edward I. (who new modelled the frame of our judicial polity) subdivided and broken up into distinct * courts of judicature. [* 113] A court of chivalry was erected, over which the constable and marshal presided; as did the steward of the household over another, constituted to regulate the king's domestic servants. The high steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers; and the barons reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort. The distribution of common justice, moreover, between man and man was thrown into so provident an order, that the great judicial officers were made to form a check upon each other: the court of chancery issuing writs framed in accordance with established precedents and under the great seal to the other courts (*h*); the common pleas being allowed to determine causes between private subjects; the exchequer managing the royal revenue; and the court of king's bench (*i*) retaining such portion of the jurisdiction of the *aula regis* as was not cantoned out to other courts, and particularly the sole cognisance of pleas of the crown or criminal causes. For pleas or suits are regularly divided into two sorts: "pleas of the crown," which comprehend all crimes and misdemeanors, wherein the crown (on behalf of the public) is the plaintiff; and "common pleas," which include all civil actions depending between subject and subject. The former of these were originally within the exclusive jurisdiction of the court of king's bench, the latter of the court of common pleas, which is a court of record, and is styled by sir Edward Coke (*k*) the lock and key of the common law; for therein only can real actions, as to which we shall hereafter inquire, be brought: and all other, or merely personal, pleas between man and man are likewise there determinable; though in regard to these latter the two other superior courts have now concurrent authority.

* The three superior courts of common law take rank, beginning [* 114] with the lowest, in the following order: the exchequer, the common pleas, the queen's bench; and as to each of these, which is now presided over by six judges (*l*), some few additional details are subjoined.

The exchequer, *saccharium*, was so called from the chequered cloth, resembling a chess-board, which covered the table there: and on which, when certain of the king's accounts were made up, the sums were marked
Exchequer. and scored with counters. It consists of two departments: the

(*g*) *Ante*, vol. i. Introd. sect. 1.

(*h*) *Ante*, p. 80.

(*i*) This court is called the queen's bench in the reign of a queen, and during the pro-

tectorate of Cromwell it was styled the upper bench.

(*k*) 4 Inst. 99.

(*l*) 81 & 82 Vict. c. 125, s. 11.

receipt of the exchequer, which manages the royal revenue, and with which these Commentaries have no concern; and the court or judicial part.

The court of exchequer seems first to have sat apart from the great council in the king's palace for the purpose of auditing his accounts, compelling payment of such feudal dues as were owing to him, and issuing writs applicable where the rights of the subject were withheld (as often happened in early times) by the officers or ministers of the crown. To this court all matters relating to the king's revenue were assigned for determination, and prior to the stat. of Rutland (10 Edward I.) it had acquired jurisdiction in some personal actions not at all affecting the rights or revenues of the crown. This appears, from the wording of the act in question, s. 3 of which enacts, that no plea shall be holden or pleaded in the exchequer unless it do specially concern the crown, its ministers or agents, in a matter appertaining to the king's exchequer. This statute, however, failed in consequence of an artifice in effecting its object, for it was held not to apply to suits between subjects who were debtors to the crown, and any suitor was permitted falsely to suggest in the process which he sued out that he was such a debtor, which at once gave the court jurisdiction (*m*).

[* 115] * The court of exchequer is presided over by a lord chief baron and five puisne barons (*n*), and still retains, besides its jurisdiction over ordinary personal actions, peculiar and exclusive cognisance of matters of revenue (*o*)—matters involving the payment of stamp, succession, or other duties to government, and matters arising out of the laws regulating the customs and excise brought before it by information at suit of the attorney-general. If, therefore, an action touching any of the matters just specified should be brought in the court of queen's bench or common pleas, it will, on motion, be removed thence into the exchequer; indeed, it is a contempt of this latter court to proceed elsewhere in respect of any matter which lies within its own peculiar jurisdiction (*p*).

The court of exchequer formerly exercised an extensive equity jurisdiction, which, by statute 5 Vict. c. 5, s. 1, was for the most part (*q*) abolished and transferred to the court of chancery.

It must not be supposed that the king's council did, even in the earliest times, itself hear and determine the great majority of cases, civil or criminal, throughout the land; for, besides the local administration of justice by

Common Pleas. [* 116] * the county or shire court, and by the hundred court (*r*), assizes were, so early as the reign of Hen. 1., occa-

(*m*) The writ upon which proceedings in the court of exchequer were grounded was called a *quo minus*; and by it the plaintiff suggested that he was the king's farmer or debtor, and that the defendant had done him the injury or damage complained of; *quo minus sufficiens existit*, by which he was the less able, to pay the king his debt or rent. (See Sellon's Pract. Introd. p. 32.) This fiction, as well as the form resulting from it, was abolished by stat. 2 Will. 4, c. 39.

(*n*) 31 & 32 Vict. c. 125, s. 11.

(*o*) See 22 & 23 Vict. c. 21. *Att.-Gen. v. Sillem*, Rep. ed. 1863.

(*p*) See *Mountjoy v. Wood*, 1 H. & N. 58; *Att.-Gen. v. Kingston*, 8 M. & W. 163.

(*q*) Except perhaps—for some doubt exists upon this point—in revenue cases. *Att.-Gen. v. Halling*, 15 M. & W. 687; *Corp. of London v. Att.-Gen.*, 1 H. L. Ca. 440. See 1 Chitt. Arch. Pr. 11th. ed. p. 2.

Suits on behalf of the Duke of Cornwall are instituted by way of information, filed by the attorney-general for the duchy, whose right to sue by information, in the nature of an English bill, on the equity side of the court of exchequer, was established in the case of *Att.-Gen. of the Prince of Wales v. St. Aubyn*, Wightw. 36.

(*r*) *Post*.

sionally held by justices itinerant, and a practice was early resorted to of issuing special commissions of oyer and terminer at the suit of individuals when any extraordinary outrage had been committed. However, appeals lay in many cases to the king's council from decisions of the justices, and great expense and delay must have been thus occasioned to suitors who were compelled to resort to the supreme court. The hardship thus caused was partially remedied by the provision in *Magna Carta* already noticed (*s*), in virtue whereof the common pleas became stationary at Westminster. Nevertheless, suitors were still compelled to come thither for justice from very distant places, and to remedy this inconvenience the statute of Westm. II. (13 Edw. I. c. 10), was passed, which enacted, that any person impleaded before the justices at Westminster, or at the assizes, might make a general attorney to sue for him. And to this statute it is thought that the habitual employment of attorneys of right in the courts at Westminster may properly be ascribed (*t*).

The court of common pleas has at this day a special cognizance of real actions (*u*). It is also the court of appeal from the decisions of revising barristers under the 6 & 7 Vict. c. 18; further it has some peculiar functions to discharge under the act for the abolition of fines and recoveries (*x*), and under "the Railway and Canal Traffic Act, 1854" (*y*). (478)

The court of queen's bench (so called because the sovereign used formerly to sit there in person, or at all events was theoretically present there, the style of the court still being *coram ipsâ reginâ*,) is (irrespective of appellate tribunals) the supreme court of common law in the * kingdom consisting of a chief justice and five puisne justices (*z*), [* 117] who are by their office the sovereign conservators of the peace, and supreme coroners of the land (*a*). Yet though the sovereign did occasionally, in early times, sit in this court (*b*), he did not, nor could he determine any cause or motion but by the mouth of his duly constituted judges (*c*).

The court of queen's bench, which (as we have said) is the remnant of the *aula regia*, is not, nor can it be, from its very nature and constitution, fixed to any certain place, but may follow the queen's person wherever she goes. It has indeed, for some centuries past, usually sat at Westminster, being an ancient palace of the crown; but might remove with the sovereign to York or Exeter, if she thought proper to command it. And we find that, after Edward I. had conquered Scotland, it actually sat at Roxburgh (*d*). And this moveable quality, as well as its dignity and power, are fully expressed by Bracton, when he says that the justices of this court are "*capitales, generales,*

(*s*) *Ante*, pp. 111, 113.

(*t*) See 1 Reeves, Hist. Eng. L. p. 169.

(*u*) *Post*.

(*x*) 3 & 4 Will. 4, c. 74.

(*y*) 17 & 18 Vict. c. 31.

(*z*) 31 & 32 Vict. c. 125, s. 11.

(*a*) *Ante*, vol. i. p. 415.

(*b*) Dr. Henry says that he found no instance of any of our kings sitting in a court of justice before Edw. IV. "Edw. IV. (he adds) in the second year of his reign, sat three

days together during Michaelmas term in the court of king's bench; but it is not said that he interfered in the business of the court; and as he was then a very young man, it is probable that it was his intention to learn in what manner justice was administered, rather than to act the part of a judge." (Hist. vol. v. 382, 4to edit.)

(*c*) 4 Inst. 71.

(*d*) M. 20, 21 Edw. I.; Hale, Hist. C. L. 200.

(478) A court or courts of common pleas exist in many of the States of the United States. For a very interesting history of the court of common pleas for the city and county of New York, by Hon. Charles P. Daly, see 1 E. D. Smith, xvii.

perpetui, et majores; a latere regis residentes, qui omnium aliorum corrigere tenentur injurias et errores" (e). And it is moreover especially provided in the *articuli super cartas* (f), that the king's chancellor, and the justices of his bench shall follow him, so that he may have at all times near unto him some that be learned in the laws.

The court of queen's bench takes cognisance both of criminal and civil [* 118] causes; the former in what is called the * crown side or crown office; the latter in the plea side of the court. The jurisdiction of the crown side it is not our present business to consider; that will be more properly discussed in the ensuing Volume. On the plea side, or civil branch, this court had originally jurisdiction and cognisance of all actions of trespass or other injury alleged to be committed *vi et armis*; of actions for forgery of deeds, maintenance, conspiracy, deceit, and actions on the case which alleged falsity or fraud, all of which were deemed to savour of a criminal nature, and made the defendant liable in strictness to pay a fine to the crown, as well as damages to the injured party (g). The origin of the action on the case has been already stated (h), and of this form of action the court claimed cognisance, on the ground that it was for a trespass; and thus assumed jurisdiction over a large class of cases, comprising injuries consequential upon but not directly caused by tort. And gradually it still further extended its jurisdiction to actions of debt, covenant (i), and so forth, by allowing a plaintiff, in the first instance, to complain of a trespass against the defendant; and afterwards, when he had thus brought him into court, permitting the plaintiff to waive his charge of trespass, and to declare against the defendant, for some matter purely civil in its nature (k).

[* 119] * The actual jurisdiction of the court of queen's bench is very high and transcendent. It has cognisance of all personal actions and actions of ejectment, with the various proceedings collateral and ancillary thereto. It is the principal criminal court in the realm. It keeps all inferior criminal jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined there, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It is also a court of error (l) from the palatinate courts, and of appeal from those courts for the purposes of the undermentioned statutes (m).

(e) L. 3, c. 10.

(f) 28 Edw. I. c. 5.

(g) Finch, L. 198; 2 Inst. 23; *Dyversité de Courtes*, c. *Bank le Roy*.

(h) *Ante*, p. 81.

(i) As to the above forms of action, *vide post*.

(k) To explain this more fully, the court amplified its jurisdiction in the manner following:—This court might always have held plea of any personal action, provided the defendant was an officer of the court; or in the custody of its marshal, or prison keeper; for a breach of the peace or any other offence. And in process of time it began by a fiction to hold plea of all personal actions whatso-

ever, and has continued to do so for ages: it having been surmised that the defendant was arrested for a supposed trespass, which he never had in reality committed; and being thus in the custody of the marshal of the court, the plaintiff was held at liberty to proceed against him for any other personal injury; this surmise, of being in the marshal's custody, the defendant was not at liberty to dispute. This fiction was abolished by the stat. 8 Will. 4, c. 39.

(l) 4 Inst. 214, 218, 223; 15 & 16 Vict. c. 76, s. 233.

(m) 17 & 18 Vict. c. 125, s. 102; 23 & 24 Vict. c. 126, s. 42.

The courts of assize and nisi prius, which I shall next notice, are derived out of, and act as collateral auxiliaries to, the foregoing. They are composed of **Courts of Assize and Nisi Prius.** two or more commissioners, who are twice at least, in every year, sent by the special commissioner of the crown, all round the kingdom (except London and Middlesex), to try by a jury, matters of fact which are in dispute. These judges of assize came into use in the room of the ancient justices in eyre, *justiciarii in itinere*; who were regularly established, if not first appointed, by the parliament of Northampton, A. D. 1176, 22 Hen. II. (n), with a delegated power from the king's great court or *aula regia*, being looked upon as members thereof; and they afterwards made their circuit round the kingdom once in seven years, for the purpose of trying causes (o). They were directed by *Magna Carta*, * c. 12, to be sent into every county [* 120] once a year, to take or receive the verdict of the jurors or recognitors in certain actions, now abolished, but which were then called recognitions or assizes; the most difficult of which they were directed to adjourn into the court of common pleas, to be there determined. The itinerant justices were sometimes mere justices of assize or of dower or of gaol delivery, and the like; and they had sometimes a more general commission, to determine all manner of causes, being constituted *justiciarii ad omnia placita* (p): but the present justices of assize and *nisi prius* are more immediately derived from the statute Westm. 2, 13 Edw. 1, c. 30, which directs them to be assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county. By statute 27 Edw. 1, c. 4 (explained by 12 Edw. 2, c. 3), assizes and inquests were allowed to be taken before any one justice of the court in which the plea was brought; associating to him one knight or other approved man of the county. And lastly, by statute 14 Edw. 3, c. 16, inquests of *nisi prius* might be taken before any justice of either bench (though the plea were not depending in his own court), or before the chief baron of the exchequer, if he were a man of the law: or otherwise before the justices of assize, so that one of such justices were a judge of the king's bench or common pleas, or the king's serjeant. The judges usually make their circuits in the respective vacations after Hilary and Trinity terms, and sit by virtue of four several commissions, issued to the clerks of assize, viz., of oyer and terminer, gaol-delivery, assize, and association (q), in order that a sufficient supply of commissioners may never be wanting.

* Such being a brief *résumé* of the jurisdiction of our superior [* 121] courts of law, three points connected with it are especially to be noticed:—

1. It is incumbent on each court to entertain and adjudicate upon any suit or matter regularly in contention before it; provided such suit or matter be not

(n) Seld. Jan. 1. 2, s. 5; Spelman, Cod. 329.
(o) Co. Litt. 293.—Anno 1261 *justiciarii itinerantes venerunt apud Wigorniam in octavis S. Johannis Baptiste;—et totus comitatus eos admittere recusavit, quod septem anni nondum erant elapsi, postquam justiciarii ibidem ultimo sederunt.* (Annal. Eccl. Wigorn. in Whart. Angl. Sacr. I. 495.)

(p) Bract. l. 3, tr. 1, c. 11.

(q) By 3 Geo. 4, c. 10, it is enacted, that the commission may be opened on the succeeding day to that appointed; and if such succeeding day be a Sunday, or any other

day of public rest, then on the next following day, provided the opening of the commission on the appointed day was prevented by the pressure of business elsewhere, or by some unforeseen cause or accident. Upon each record brought from the court of exchequer before the judges of assize, a separate commission was formerly issued by that court; but by stat. 2 & 3 Vict. c. 22, they are authorised on their circuits, without any commission to try causes and take inquisitions of pleas pending in the exchequer.

so frivolous as to involve a mere waste of time in its investigation; nor of such a nature, as to lead to enquiries inconsistent with public decency, or with the dignity of justice: for the rule stated by our ancient writers is *non recedant quærentes à curiâ regis sine remedio* (r). (479)

2. Each of our superior courts is bound to keep within the limits of its jurisdiction. The consent of parties would not suffice to make operative a judgment of the court of common pleas on a crown case, or of the court of queen's bench in a real action; because the particular tribunal specified would have no power to entertain the case before it: the whole proceeding would be illusory, and lead to no result in legal contemplation (s). (480)

3. It is not competent to parties, by any stipulation between themselves, to oust the jurisdiction of the courts. The precise meaning, however, of this expression "ousting the jurisdiction of the courts," deserves attention. It means, that when a cause of action has accrued, parties cannot by contract say that there shall not be jurisdiction to enforce damages in respect thereof. Parties cannot enter into a contract which gives rise to a right of action for the breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals. Parties may, however, enter into a contract, such that no breach of it shall occur until after a reference has been made to arbitration (t). (481)

(r) 2 Inst. 405.

(s) See *Lawrence v. Wilcock*, 11 Ad. & E. 941.

(t) The distinction, *supra*, may be thus illustrated. If I covenant with A. to do particular acts, and make default, and afterwards it is covenanted between us that any question arising as to breach of covenants shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. A right of action having accrued, it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the

medium of the ordinary tribunals. But if I covenant with A., that if I do, or omit to do a certain act, I will pay to him such a sum as T. S. shall award as the amount of damage sustained by him, then until T. S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen against me. Nor does the policy of the law prevent parties from so contracting. Judgment of Lord Cranworth, C., *Scott v. Avery*, 5 H. L. Ca. 811; *Lowndes v. Earl of Stamford*, 18 Q. B. 425.

(479) Courts will not enforce fraudulent and immoral agreements. In such cases, they are bound, in the interest of public justice and from a sense of self-respect, to withhold their sanction and dismiss the parties. *Denton v. Irwin*, 6 La. Ann. 817. So courts will not lend their aid to foster idle, circuitous, and wasteful litigation. *Hyde v. New Orleans*, 11 id. 191. But where the court has jurisdiction of the subject-matter and of the parties to the suit, it will render its judgment without waiting to inquire whether either party has sufficient property in the jurisdiction to respond to such judgment. The question as to how this judgment shall be satisfied when he gets it, is for the party who obtains it, and not for the court. *March v. Eastern R. R. Co.*, 40 N. H. 548.

(480) The rule that consent of parties cannot confer jurisdiction in a matter which is excluded by law, is well settled by American authorities. See *Andrews v. Wheaton*, 28 Conn. 112; *Bents v. Graves*, 3 McCord (S. C.), 280; *Wells v. Reynolds*, 1 Treadw. (S. C.) 478; *Ormsby v. Lynch*, 6 Litt. (Ky.) 808; *Randolph County v. Rolls*, 18 Ill. 29; *McHenry v. Wallen*, 2 Yerg. (Tenn.) 441; *Cleveland v. Welsh*, 4 Mass. 598; *Walker v. Rogan*, 1 Wis. 597; *Bureau County v. Thompson*, 39 Ill. 566; *Damp v. Dane*, 29 Wis. 419; *State v. Tappan*, id. 664. And the proceedings of any tribunal, not having jurisdiction of the subject-matter which it professes to decide, are void. *Collamer v. Page*, 35 Vt. 387; *Wickes v. Cault*, 5 Har. & J. (Md.) 42; *Griffith v. Frazier*, 8 Cranch, 9; *State v. Richmond*, 26 N. H. 232. Objection to the jurisdiction of the person may, however, be waived by the act of the party. *Id.*; *State v. Tappan*, 29 Wis. 664; *Damp v. Dane*, id. 419.

(481) The rule that an agreement to arbitrate is not sufficient to oust a court of law or equity of jurisdiction, is said to be a departure from the general principle that effect should

* With regard to the three rules stated as applicable to our superior courts of original or primary jurisdiction, we observe, that they rest on grounds of manifest policy and expediency. Our courts cannot refuse to listen and do justice to a suitor—who in a respectful and becoming manner, and with due regard to the recognised method of procedure, brings before them his complaint. Our courts cannot assume and exercise jurisdiction, even by consent of parties, beyond those limits within which alone they have been authorised and commissioned to do justice. Lastly, it is not compatible with the dignity of our superior courts, that their jurisdiction should be set aside. [* 122]

The briefest allusion will here suffice to our appellate courts, one principal use of which is to prevent the law from being changed. Were there no such superior tribunals, it would be easy for judges, by construction and interpretation, to change even a written law; and yet more easy would it be for them to change our customary unwritten law, which depends upon usage solely (u).

The court of exchequer chamber derives its origin from the stats. 31 Edw. 3, st. 1, c. 12 (x), and 27 Eliz. c. 8, and was first established to hear and determine causes brought *before it by writ of error, from the common law side of the exchequer. The jurisdiction and constitution of this court were, however, materially altered by the stat. 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, which enacted, that writs of error upon any judgment given by the court of king's bench, common pleas, or exchequer, should thereafter be made returnable only before the judges, or judges and barons, as the case might be, of the other two courts in the exchequer chamber. [* 123]

Some additional duties have been imposed on this court, by the Common Law Procedure Act, 1854 (y).

Side by side with the court of exchequer chamber may be placed, a court quite differently constituted, the jurisdiction of which is also different, viz., the judicial committee of the privy council. This court, so far as its common law jurisdiction is concerned, besides some peculiar duties in respect of patents and copyright, entertains appeals from our colonies and dependencies; and when it has come to a decision upon any case submitted to it, reports its opinion to the sovereign for approval and confirmation (z).

From the court of exchequer chamber, a writ of error lies to the house of peers, which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but jurisdiction only upon appeals and writs of error, to rectify any injustice or mistake

(u) *Barnardiston v. Soame*, 6 St. Tr. 1094. 1095.

(x) By which enactment it was originally erected, as above stated, to hear causes brought from the court of exchequer.

(y) Sect. 36.

(z) The statutes relating to the constitution of the judicial committee of the privy council, and its jurisdiction, are collected in M'Pherson's P. C. Prac. App.

be given to contracts when lawful in themselves, according to their terms and the intent of the parties, and that it will not be extended or applied to new cases not coming within the letter and spirit of the decisions already made. *President, etc., of Delaware, etc., Canal Co. v. Penn. Coal Co.*, 50 N. Y. (5 Sick.) 250; see *Hurst v. Litchfield*, 89 N. Y. (12 Tiff.) 877; *Herrick v. Belknap*, 27 Vt. 678.

of the law, committed by the court below. To such authority this august tribunal succeeded of course, upon the dissolution of the *aula regia*. For, as the barons of parliament were constituent members of that court, and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside, it [*124] * followed, that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great court was derived (*a*). The house of lords is therefore, in all home causes, the last resort, from whose judgment no further appeal is permitted. Those members of the house, who alone take part in the hearing of appeals, are, conformably to the established practice, peers who have previously discharged important judicial functions, and bring therefore, to the consideration of questions submitted to them, the very highest attainable amount of legal knowledge, experience, and wisdom. Moreover, in difficult cases, they refer themselves to, but are in no degree bound by, the opinions of the judges, who are summoned by writ to advise them. (482)

The house of lords recognizes and conforms to its own prior decisions, which can only be affected by act of parliament (*b*). If, indeed, a precedent found amongst the decisions of this tribunal were deemed objectionable, such judgment would probably be treated as a binding authority, in no case, and under no circumstances, differing or distinguishable from those to which it had been applied: so that, practically, its operation would be restricted within very rigid limits.

[*125]

*CHAPTER VIII.

JURISDICTION OF THE SUPERIOR COURTS OF LAW.

WRONGS AFFECTING THE PERSON—REPUTATION—LIBERTY AND RELATIVE RIGHTS.

THE jurisdiction exercised by our superior courts of common law will in this and some ensuing chapters be considered; and in treating of it I shall at first confine myself to such wrongs and breaches of contract as may be committed in the mutual intercourse between subject and subject: which the sovereign, as the fountain of justice, is officially bound to redress in the ordinary forms of law: reserving such injuries or encroachments as may occur between the crown and the subject, to be considered hereafter, since the

(*a*) As to the appellate jurisdiction of the house of lords, see also stats. 14 Edw. 3, c. 5; 17 & 18 Vict. c. 125, s. 86.

(*b*) *Tommey v. White*, 3 H. L. Ca. 49; *Wilson v. Wilson*, 5 Id. 40, 63; *Att.-Gen. v. Dean, &c. of Windsor*, 8 Id. 369.

(482) The law governing appellate proceedings in the United States, though founded upon the common law, has, both in the courts of the several States and those of the United States, been to a greater or less extent modified by statutes or reformed codes of procedure. The plan of investing the more permanent branch of the State legislature with high appellate power was tested in the States of New York and New Jersey, but, after an experience of some years, has been abandoned as unsatisfactory.

remedy in such case is generally of a somewhat peculiar and eccentric nature.

Now, since all wrong may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the being put in possession of that right, whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded: or, where that is not possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages; as in case of assault, or breach of contract, to which damages the party injured has acquired an incomplete or inchoate right, the instant he receives the injury, or has to complain of the breach of contract; though such right be not fully ascertained till damages are assessed by the intervention of the law. The mode whereby this remedy is obtained, is in general a *suit or action defined by the [*126] Mirror (a) to be "the lawful demand of one's right:" and a right of action is, according to Bracton and Fleta, using the words of Justinian (b) *jus prosequendi in judicio quod alicui debetur*.

The Romans early introduced set forms for actions and suits in their law, after the example of the Greeks; and made it a rule that each injury should be redressed by its proper remedy only. "*Actiones*," say the pandects, "*compositæ sunt, quibus inter se homines disceptarent: quas actiones, ne populus prout vellet institueret, certas solennesque esse voluerunt*" (c). The forms of these actions were originally preserved in the books of the pontifical college, as choice and inestimable secrets; till one Cneius Flavius, the secretary of Appius Claudius, stole a copy and published them to the people (d). The concealment was ridiculous: but the establishment of some standard was undoubtedly necessary, to fix the true state of a question of right; lest in a long and arbitrary process it might be shifted continually, and be at length no longer discernible. Or, as Cicero expresses it (e), "*sunt jura, sunt formulæ, de omnibus rebus constitutæ, ne quis aut in genere injuriæ, aut ratione actionis, errare possit. Expressæ enim sunt ex uniuscujusque damno, dolore, incommodo, calamitate, injuriâ, publicæ a prætore formulæ, ad quas privata lis accommodatur*."

Three kinds of actions. With us in England the several suits, or remedial instruments of justice, are distinguished into three kinds; actions personal, real, and mixed.

A personal action is that whereby a man claims a debt, or seeks to recover damages for breach of contract, or of some personal duty: and likewise, whereby a man claims a satisfaction in damages for some wrong done to his person or property. The former is, in general, founded on contract, the latter upon tort, as in the Roman law we * read of "*actiones in personam, quæ adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere*" (f). [*127]

A real action was so called, because it concerned real property only: it is now of rare occurrence, by reason of enactments which will be hereafter noticed.

(a) C. 2, s. 1.

(b) Inst. 4, 6, pr.

(c) Dig. 1, 2, 2, s. 6.

(d) Cic. pro Mursena, s. 11; De Orat. l. 1, c. 41.

(e) Pro Qu. Roscio, s. 8.

(f) Inst. 4, 6, 15.

A mixed action partakes of the nature of the other two, for therein some real property is demanded, and personal damages also may often be recovered.

To one or other of the above three heads may every species of remedy by suit or action in a court of common law be referred. But in order effectually to apply the remedy, it is first necessary to ascertain the complaint. I proceed therefore now to enumerate the several kinds, and to enquire into the respective natures of such private wrongs and breaches of contract as are of practical concern; for to enumerate every infraction of right would be impossible.

In treating this subject, I shall adopt the same method that was pursued with regard to the distribution of rights: for as wrongs are nothing else but an infringement or breach of those rights, which we have before laid down and explained, it will follow that this negative system, of wrongs, must correspond and tally with the former positive system, of rights. As therefore, we divided (g) rights into those of persons, and those of things, so we must make the same general distribution of injuries into such as affect the rights of persons, and such as affect, directly or indirectly, the rights of property.

The rights of persons, we may remember, were distributed into absolute and relative: absolute, which were such as appertained and belonged to private men, considered merely as individuals, or single persons; and relative, which were incident to them as members of society, and connected to each other by various ties and relations (h). * And the absolute rights of [* 128] each individual were defined to be: I. The right of personal security: II. The right of personal liberty: and, III. The right of private property (i); so that the wrongs or injuries affecting them, must consequently be of a corresponding nature.

I. Injuries which affect the personal security of an individual, are either against his life, his limbs, his body, his health, or his reputation.

1. With regard to injuries affecting the life of man, they do not, except as noticed at page 150, fall under our present contemplation; being one of the most atrocious species of crimes, the subject of the next volume of our Commentaries. (483)

(g) Vol. i. chap. i.
(h) Vol. i. p. 147.

(i) Vol. i. p. 153.

(483) No civil action lies at common law for causing the death of a human being. *Carey v. Berkshire R. R. Co.*, 1 Cush. (Mass.) 475; *Ohio & M. R. R. Co. v. Tindall*, 13 Ind. 366; *Whitford v. Panama R. R. Co.*, 23 N. Y. (9 Smith) 465; *Green v. Hudson River R. R. Co.*, 2 Abb. Ct. App. 277. But this rule has been modified by statute in England and in several of the States of the Union, so as to allow an action by the personal representatives of the deceased, for the benefit of the husband or widow and next of kin. See *Hooper v. Gorham*, 45 Me. 209; *Green v. Hudson River R. R. Co.*, 2 Abb. Ct. App. 277, note; *Carey v. Berkshire R. R. Co.*, 1 Cush. (Mass.) 366; *Eden v. Lexington, etc.*, 14 B. Monr. (Ky.) 204; *Hough v. New Orleans, etc.*, 6 La. Ann. 415; *North v. Robinson*, 44 Penn. St. 175; *Chicago v. Major*, 18 Ill. 349; *Lyons v. Cleveland, etc.*, 7 Ohio St. 336; *Whitford v. Panama, etc., R. R.*, 3 Bosw. 67.

2, 3. The two next species of injuries, affecting the limbs ^{or} bodies of individuals, I shall consider in one and the same view. And ^{these may be committed:} (1.) By assault; which is an attempt ^{or offer to beat} another, without touching him: as if one ^{lifts up his cane, or} his fist, in a threatening manner at another; ^{or strikes at him,} but misses him; this is an assault, *insultus*, which Finch (k) describes to be "an unlawful setting upon one's person." This is an inchoate violence; and therefore, though no actual suffering be proved, yet the party injured may have redress by action of trespass; wherein he may recover damages as a compensation for the injury. (484) (2.) By battery;

s & 3. Affecting the limbs or body.

Assault.

Battery.

which is the unlawful beating of another. The least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner. (485) Battery is, however, in some cases, justifiable or lawful; as where one who has authority, a parent or master, gives moderate correction to his child, * his scholar, or his apprentice. So also on the principle of self- [* 129] defence: for if one strikes me first; or even only assaults me, I may strike in my own defence; and, if sued for doing so, may plead *son assault demesne*, or that it was the plaintiff's own original assault that occasioned mine. So likewise in defence of my goods or possession: if a man endeavours to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away (l).

(k) Finch, L. 202.

(l) 1 Finch, L. 203.

(484) It is not essential to constitute an assault, that there should be a direct attempt at violence (*Hays v. People*, 1 Hill, 351); but mere *threats* do not amount to an assault. *Keyes v. Devlin*, 3 E. D. Smith, 518; *Smith v. State*, 38 Miss. 521. The question, as to what constitutes an assault, is one of law, for determination by the court. See *Handy v. Johnson*, 5 Md. 450; *Commonwealth v. Goodwin*, 3 Cush. (Mass.) 154.

An offer to strike, beat, or commit any act by violence on the person of another, without actually doing it, or touching his person, is an assault. *Johnson v. Tompkins*, 1 Baldw. C. C. 571, 600; *United States v. Hand*, 2 Wash. C. C. 435. The gist of an assault is the intent to injure. *Richels v. State*, 1 Sneed (Tenn.), 606. It implies force upon one side, and want of assent upon the other. An assault upon a consenting party would be a legal absurdity. *Duncan v. Commonwealth*, 6 Dana (Ky.), 295; *Smith v. State*, 12 Ohio St. 486; but see *Hays v. People*, 1 Hill, 351.

Although no words of provocation will justify an assault, they may constitute a ground for the reduction of damages. *Waters v. Brown*, 3 A. K. Marsh. (Ky.) 559; *Ireland v. Elliott*, 5 Iowa, 478; *Murray v. Boyne*, 42 Mo. 472; *State v. Wood*, 1 Bay (S. C.), 351.

(485) Every battery includes an assault. *Johnson v. State*, 17 Tex. 515.

In an action for a simple assault and battery, the plaintiff, without alleging special damages, may give evidence of any damages naturally and necessarily resulting from the act complained of. *O'Leary v. Rowan*, 31 Mo. 117; *Andrews v. Stone*, 10 Minn. 72. For an unprovoked and aggravated assault exemplary damages may be given. *Foots v. Nichols*, 28 Ind. 486; see *Mooney v. Kennett*, 19 Mo. 551; *Whitney v. Hitchcock*, 4 Denio, 461; *Gore v. Chadwick*, 6 Dana (Ky.), 477.

An assault and battery may be justified in defense of real or personal property, but unless the assailant uses force in fact, not before a request to depart; and then the force used must be no more than is necessary under the circumstances. *Gyre v. Oliver*, 47 Barb. 592; *Baldwin v. Hayden*, 6 Conn. 453; *Commonwealth v. Goodwin*, 3 Cush. (Mass.) 154; *Dole v. Erskine*, 35 N. H. 508; *Hazel v. Clark*, 3 Harr. (Del.) 22.

Thus too in the exercise of his office, a churchwarden or beadle may lay hands upon another to turn him out of church, and to prevent his disturbing the congregation (*m*). And if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon the plaintiff gently, *molliter manus imposuit*, for such purpose. On account of these causes of justification, battery is defined to be the unlawful beating of another; for which the remedy is, as for assault, by action of trespass, wherein adequate damages are recoverable.

A battery may be aggravated by wounding or mayhem, which, according to its strict technical meaning, consists in violently depriving another of the use of a member proper for his defence in fight (*n*). Any bodily hurt, whether caused by direct violence, or resulting from negligence, is, if adequate ground of excuse or justification be wanting, actionable. The nature of such an injury will hereafter be sufficiently exemplified.

4. Injuries, affecting a man's health, may be constituted by selling him bad provisions (*o*), or wine (*p*); by the exercise of a noisome trade, which infects the air in his neighbourhood; or by the neglect or unskilful management of his physician, surgeon, or apothecary. [*130] *Mala praxis*, indeed, may constitute an offence at common law, whether it be for curiosity and experiment, or by neglect; and is especially reprehensible, because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction (*q*). (486) Thus also, in the Roman law (*r*), neglect and want of skill in physicians or surgeons, "*culpa adnumerantur, veluti si medicus curationem dereliquerit, male quempiam secuerit aut perperam ei medicamentum dederit.*" The above are wrongs

(*m*) 1 Sid. 301. *Burton v. Henson*, 10 M. & W. 105.

(*n*) Finch, L. 204; 1 Hawk. P. C. 107. For assault, battery, wounding, or mayhem, an indictment may be brought, *post*, vol. iv., pp. 239, 240.

(*o*) See *Burnby v. Bollatt*, 16 M. & W. 644.

(*p*) 1 Roll. Abr. 90.

(*q*) Lord Raym. 214; *post*.

(*r*) Inst. 4, 3, 6, & 7.

(486) The implied contract of a physician or surgeon is not to cure, but to treat the case with reasonable diligence and skill; and in judging of this degree of skill, regard is to be had to the advanced state of the profession at the time. *McCandless v. McWha*, 22 Penn. St. 261. But see *Smothers v. Hanks*, 34 Iowa, 287. A physician who professes to be an expert in a specialty, and who is employed as such, must possess the education and skill, and must show the diligence of an expert in such specialty. See *Wilmot v. Howard*, 32 Vt. 447; *Patten v. Wigen*, 15 Me. 594; *Long v. Morrison*, 14 Ind. 595; *Wood v. Clapp*, 4 Sneed (Tenn.), 65; *Howard v. Grover*, 28 Me. 97; Whart. on Neg., § 730. Thus, one holding himself out as a surgeon is liable as well for want of skill as for negligence; and the injured party may bring his action to recover for damages resulting from both, and recover on proving damages resulting from either. *Carpenter v. Blake*, 60 Barb. 488; see S. C., 50 N. Y. (5 Sick.) 696; *Corsi v. Maretschek*, 4 E. D. Smith, 1; *Bourman v. Woods*, 1 Iowa, 441. But, if the plaintiff shows no injury resulting from negligence, or want of due skill in the defendant, he will not be entitled to recover even nominal damages. *Craig v. Chambers*, 17 Ohio St. 258. So it is the duty of a patient to co-operate with his professional adviser, and to conform to the necessary prescriptions; and, if he will not, or under the pressure of pain cannot, he has no right to hold his surgeon responsible for his own neglect. *McCandless v. McWha*, 22 Penn. St. 261; S. C., 25 id. 95. See *Hibbard v. Thompson*, 109 Mass. 288; *Leighton v. Sargeant*, 7 Post. (N. H.) 460.

A dentist is required to use a reasonable degree of care and skill in his professional operations. The exercise of the highest perfection of his art is not implied in his professional contract. *Simonds v. Henry*, 89 Me. 155.

or injuries unaccompanied by force, for each of which there is a remedy in damages by action on the case, a remedy available for a personal wrong or injury without force. In very early times methods were prescribed, and forms of actions settled, for redressing those wrongs, which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of a debt, detaining one's goods or the like; and where any special consequential damage arose, which could not be foreseen and provided for in the ordinary course of justice, the party injured was allowed, both at common law and by the statute of Westm. 2, c. 24, to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance (*s*). For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action (*t*); and therefore, wherever a new injury is done, a new method of remedy must be pursued. And it is a settled distinction, that where an act is done which is in itself an immediate injury to another's person, there the remedy is usually by an action of trespass; but where there is no act done, but only a culpable omission; or where the act is not immediately injurious, but only by consequence and collaterally; there no action of trespass * will lie, but an action on the special case, for damages consequent [* 131] on such omission or act (*u*). (487)

5. Lastly, injuries affecting a man's reputation or good name may be constituted, 1st, by malicious, scandalous, and slanderous words, tending to his damage and derogation. As if a man maliciously and falsely utter any slander or false tale of another; which may either endanger him in law, by impeaching him of some crime, as to say that a man has poisoned another, or is perjured (*x*); or which may exclude him from society, as to charge him with having an infectious disease (*y*), or which may impair or hurt his trade, profession, or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave (*z*). It is said, that formerly no actions were brought for words, unless the slander was such as (if true) would endanger the life of the object of it (*a*). But too great encouragement being given by this lenity to false and malicious slanders, it is now held that for scandalous words of the several species before-mentioned, (that may endanger a man by subjecting him to the penalties of the law, may exclude him from society, or may impair his trade or profession,) an action on the case will lie, without proving any particular damage to have happened. But with regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened, and any defamatory or disparaging words producing damage are actionable. If I say that such a clergyman is a bastard, he cannot for this bring any action

(*s*) *Ante*, p. 80.

(*t*) *Ashby v. White*, 2 Lord Raym. 953.

(*u*) Compare *Ashby v. White*, *supra*; *Scott v. Shepherd*, 2 W. Bl. 892; *Chapman v. Pickering*, 2 Wils. 146; per Ashhurst, J., *Pasley*

v. Freeman, 3 T. R. 63; *Winsmore v. Greenbank*, Willes, 577.

(*x*) Finch, L. 185.

(*y*) Com. Dig. Act. Def. (D. 28).

(*z*) Finch, L. 186.

(*a*) 2 Vent. 28.

(487) See *Codman v. Evans*, 7 Allen (Mass), 481; *Ray v. Sellers*, 1 Duv. (Ky.) 254; *Webb v. R. W. & O. R. R. Co.*, 49 N. Y. (4 Sick.) 420; S. C., 10 Am. Rep. 389; *Murphy v. N. Y., etc.*, 80 Conn. 187; *Chiles v. Drake*, 2 Metc. (Ky.) 146; *Panton v. Holland*, 17 Johns. 92.

against me, unless he can show some special loss by it; in which case he may [* 132] maintain his action against me, for saying he was a *bastard, *per quod* he lost the presentation to such a living (b).

Words spoken in derogation of a peer, judge, or other great officer of the realm, were formerly called *scandalum magnatum*, and were held to be especially heinous (c): and though such as would not be actionable in the case of a common person, yet when spoken in disgrace of these high and respectable characters, were held to amount to an atrocious injury; which was redressed by an action on the case founded on several ancient statutes (d); as well on behalf of the crown, to inflict punishment on the slanderer, as on behalf of the party, to compensate him by damages for the injury sustained. The action for *scandalum magnatum* is now obsolete, but words tending to scandalize a magistrate, member of parliament, or person in an eminent position, or in a public trust, are reputed to be in general more highly injurious than when spoken of a private man, and may render the individual who has promulgated the slander punishable on criminal information (e).

Mere scurrility, or opprobrious words, without damage, will not support an action; neither will words of heat and passion do so, if productive of no ill consequence: nor are words spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill will, and under circumstances such as will be presently indicated (f), actionable. Neither (as was formerly hinted (g)), do reflecting words made use of by counsel in legal proceedings, and pertinent to the cause in hand, or made use of by the judge (h), constitute a sufficient cause of action for slander. Also if the [* 133] defendant *be able to justify, and prove the words to be true, no action will lie (i), even though special damage has ensued: for then it is no slander or false tale. Thus, if I can prove the tradesman a bankrupt, the physician a quack, or the lawyer a knave, this will furnish a defence to their respective actions: for though there may be damage accruing from it, yet, if the fact be true, it is *damnum absque injuriâ*; and where there is no injury, the law, as a general rule, gives no remedy. And this is agreeable to the reasoning of the Roman law (k): "*eum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit.*"

The repeating of a rumour which is slanderous is not, however, justifiable (l). And falsely and maliciously to slander another man's title, by spreading such injurious reports, as, if true, would deprive him of his estate, or tend to cut down the extent of title to it, is actionable, provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land (m). (488)

(b) *Davis v. Gardiner*, 4 Rep. 16.

(c) 1 Ventr. 60.

(d) See Stats. Westm. 1; 3 Edw. 1, c. 34; 2 Ric. 2, c. 5; 12 Ric. 2, c. 11.

(e) *Ex parte Chapman*, 4 Ad. & E. 773; *Ex parte Duke of Marlborough*, 5 Q. B. 955; *Reg. v. Gregory*, 8 Ad. & E. 907.

(f) *Post*, p. 184.

(g) *Ante*, p. 25.

(h) *Scott v. Stanfeld*, 37 L. J. Ex. 155.

(i) 4 Rep. 13 b.

(k) Dig. 47, 10, 18.

(l) *Watkin v. Hall*, L. R. 8 Q. B. 396.

(m) *Pater v. Baker*, 3 C. B. 831.

(488) Slander is defined as the imputation (1) of some temporal offense for which the party might be indicted and punished in the temporal courts; (2) of an existing contagious disorder tending to exclude the party from society; (3) an unfitness or inability to perform an office or employment of profit, or want of integrity in an office of honor; (4) words prejudicial

2ndly. A second way of affecting a man's reputation is by the maliciously publishing of a printed or written libel, picture, sign, or the like; which sets him in an odious, contemptible, or ridiculous light, and thereby diminishes his reputation (n). A libel, as we shall hereafter see, is indictable (o); it is also actionable, without proof of special damage, and in an action which is to compensate the plaintiff by pecuniary damages for the

(n) *Du Bost v. Beresford*, 2 Camp. 511; (o) *Post*, vol. iv.
Anon. 11 Mod. 99. *The Case of Libels*, 5 Rep. 125 a.

ing a person in his lucrative profession or trade; (5) any untrue words occasioning actual damage. 1 Hill. on Torts, 328. And see *Kimmis v. Stiles*, 44-Vt. 351; *McEwen v. Ludlow*, 2 Harr. (Del.) 12; *Brooker v. Coffin*, 5 Johns. 188; *Van Ness v. Hamilton*, 19 id. 387; *Irons v. Field*, 9 R. I. 216; *Hammond v. Hussey*, 51 N. H. 40.

In several of the States of the Union, statutes prescribe what words shall be actionable; thus, in New York "an action may be maintained by a female, whether married or single, to recover damages for words hereafter spoken, imputing unchastity to her, and it shall not be necessary to allege or prove special damages in order to maintain such action." Laws 1871, ch. 319. The statutes of the particular State should be consulted.

Among actionable words and phrases *per se*, when published orally of an individual, are the following: Receiver of stolen goods (*Dias v. Short*, 16 How. 322); counterfeit (Thirman v. *Matthews*, 1 Stew. [Ala.] 884); dealer in counterfeit money (*Pike v. Van Wormer*, 6 How. 99); bogus peddler (id.); concealing stolen goods (*Miller v. Miller*, 8 Johns. 74); hog thief (*Cheatwood v. Mayo*, 5 Munt. [Va.] 16); he killed a horse (8 Rich. [S. C.] 242); he poisoned my cow (*Burton v. Burton*, 3 Iowa, 316); you are a vagrant (*Miles v. Oldfield*, 4 Yeates [Penn.], 423); she keeps a whore-house (*Wright v. Page*, 36 Barb. 438); she produced a false heir or a bogus baby (*Weed v. Bibbins*, 33 id. 315). So words spoken of a woman, charging that she had intercourse with a beast, or had committed sodomy, are actionable *per se*. *Haynes v. Ritchey*, 30 Iowa, 76; S. C., 6 Am. Rep. 642. The following have been held not actionable *per se*: Cheat (*Stevenson v. Hayden*, 2 Mass. 406; *Chase v. Whitlock*, 3 Hill, 139); deserter (*Hollingsworth v. Shaw*, 19 Ohio, 430); liar (*Smalley v. Anderson*, 4 Monr. [Ky.] 387); rogue (*Idol v. Jones*, 2 Dev. [N. C.] 162); scoundrel (*Quinn v. O'Garra*, 2 E. D. Smith, 388); swindler (*Chase v. Whitlock*, 3 Hill, 139); he robbed the treasury and bought a farm with it (*Allen v. Hillman*, 12 Pick. [Mass.] 101); he whipped his wife (*Dudley v. Horn*, 21 Ala. 379; *Birch v. Benton*, 26 Miss. 153); or his mother (*Speaker v. McKensie*, id. 255). Imputations of having, at the present time, the venereal disease or the gonorrhoea are actionable in themselves. *Williams v. Holdredge*, 22 Barb. 396; *Golderman v. Stearns*, 7 Gray (Mass.), 181.

It is held that words to be slanderous must be spoken with an intent to slander, and must be so understood by the hearers. *St. Martin v. Desnoyer*, 1 Minn. 156; *Harwood v. Keech*, 4 Hun, 389; *Studdard v. Linville*, 8 Hawks (N. C.), 474; *Moulder v. Harding*, 33 Ind. 176; S. C., 5 Am. Rep. 195. But see *McKee v. Ingalls*, 4 Scam. (Ill.) 30; *Long v. Bakle*, 4 Md. 454. The defendant may prove, either in excuse or mitigation, that he was insane when the words were spoken. *Yeates v. Reed*, 4 Blackf. (Ind.) 463; *Horner v. Marshall*, 5 Munt. (Va.) 466; *Dickinson v. Barber*, 9 Mass. 325. So, drunkenness may be shown in mitigation of damages (see *Howell v. Howell*, 10 Ired. [N. C.] 84; *Gates v. Meredith*, 7 Ind. 440); or, with the same view, it may be shown that the words were spoken in the heat of passion or under excitement. *Moulder v. Harding*, 33 Ind. 176; S. C., 5 Am. Rep. 195.

No action will lie for slanderous words which are immediately retracted or explained in the same conversation, and in the hearing of all who heard them spoken. *Brown v. Brooks*, 3 Ind. 518; *Luine v. Maton*, 13 Tex. 449; *Wenchell v. Strong*, 17 Ill. 597. But it is not enough that the party swears that he made the explanation. It must be made to appear that the explanation was heard and understood by the hearers, since only in that event would the words be rendered harmless in respect to the plaintiff. *Maydes v. Flak*, 49 Barb. 326. See *Kent v. Bonsey*, 33 Me. 435; *Scott v. McKinnish*, 15 Ala. 663; *Matthews v. Beach*, 5 Sandf. 256; *Stallings v. Newman*, 26 Ala. 300.

To render a charge actionable it is not necessary that it should be made in direct terms. It may be made in ambiguous language or by insinuation. *Dickey v. Andros*, 33 Vt. 55;

wrong done him, the defendant may, as in an action for words spoken, justify by showing the truth of the facts which he has alleged and published. The publication of a libel may be evidenced in various ways, as by reading it aloud, [*134] by selling it, or distributing it gratis, or by sending it through * the post, or otherwise, to a third person (*p*). Such publication is presumed to have been malicious, though it is competent to the defendant to rebut the inference of malice by proving that the libel was published on an occasion or under circumstances which would, on grounds of public policy, justify the publication, *ex. gr.* in giving the character of a servant (*q*). But the counter presumption which thus arises that the words were not maliciously spoken, may be rebutted by proof of express malice on the part of the defendant (*r*). (489)

(*p*) *R. v. Burdett*, 4 B. & Ald. 126, 143, 160; *Wenman v. Ash*, 13 C. B. 836.

(*q*) As to which *Chambre, J.* in *Rogers v. Clifton*, 8 B. & P. 594, said, "I take the law to be well settled, that where a master is applied to for the character of a servant, the former is not called upon in an action to prove the truth of any aspersions thrown out by him against the latter; but that it lies

upon the servant to prove the falsehood of such aspersions. In such case, the master is justified, unless the servant prove express malice." See also *Taylor v. Hawkins*, 16 Q. B. 321, and cases there cited; *Somerville v. Hawkins*, 10 C. B. 588.

(*r*) *Bromage v. Prosser*, 4 B. & C. 247; *Jackson v. Hopperton*, 16 C. B. N. S. 829.

Rundell v. Butler, 6 Barb. 260; *Cooper v. Perry*, Dudley (Ga.), 247; *Marshall v. Gunter*, 6 Rich. (S. C.) 419; *Goodrich v. Davis*, 11 Metc. (Mass.) 473.

Words that are merely abusive and insulting are not actionable, unless special damages are alleged and proved. *Davis v. Farrington*, Walk. (Miss.) 304. See *Seaton v. Cordray*, Wright (Ohio), 101; *Lucas v. Nichols*, 7 Jones (N. C.), 82. Otherwise, by statute, in Mississippi. *Davis v. Farrington*, Walker, 304. And it is actionable in Massachusetts to charge a woman with drunkenness. *Brown v. Nickerson*, 5 Gray, 1.

An action for slander is *transitory* (*Hull v. Vreeland*, 42 Barb. 543; S. C., 18 Abb. 182; *Boynton v. Boynton*, 43 How. 380, 383); and the action will lie in one State for words spoken in another, if actionable at common law. *Id.*; *Linville v. Earlywine*, 4 Blackf. (Ind.) 469; *Offutt v. Earlywine*, *id.* 460; *Lister v. Wright*, 2 Hill, 320; *Johnson v. Dicken*, 25 Mo. 580; *Poe v. Grever*, 3 Sneed (Tenn.), 664.

The truth of the charge is, in general, a sufficient defense in an action for slander; but the defendant cannot give in evidence the truth of the imputation, without pleading such truth as a justification. See *Taylor v. Robinson*, 29 Me. 323; *Douge v. Pearce*, 13 Ala. 127; *Shepard v. Merrill*, 18 Johns. 475; *Van Ainken v. Westfall*, 14 *id.* 234; *Haws v. Stanford*, 4 Sneed (Tenn.), 520; *Burke v. Miller*, 6 Blackf. (Ind.) 155; *Gilmer v. Eubank*, 13 Ill. 271; *Watson v. Moore*, 2 Cush. (Mass.) 133. See *Spooner v. Keeler*, 51 N. Y. (6 Sick.) 527; *Farr v. Rasco*, 9 Mich. 353.

Slander of title to personal property, as well as to real property, is actionable. *Like v. McKinstry*, 3 Abb. Ct. App. 62; S. C., 4 Keyes, 397. To support the action it must be shown that false words, maliciously spoken, were followed as a strict legal consequence by pecuniary damage to the plaintiff; and this must be specially alleged and substantially proved. *Kendall v. Stone*, 5 N. Y. (1 Seld.) 14; *Bailey v. Dean*, 5 Barb. 297. See *Hill v. Ward*, 13 Ala. 310; *Stark v. Chetwood*, 5 Kan. 141; *Paull v. Halferty*, 63 Penn. St. 46; *Linden v. Graham*, 1 Duer, 670.

(489) Any one who knowingly circulates a libel publishes it. *Layton v. Harris*, 3 Harr. (Del.) 406. If the publication is made without the consent of the writer the offense is not complete as to him. *Weir v. Hoss*, 6 Ala. 881. An action for a libel lies by the party injured, against the proprietor of a newspaper, although the publication was made by the editor without the knowledge of such proprietor. *Huff v. Bennett*, 4 Sandf. 120; *Andres v. Wells*, 7 Johns. 260; *Com. v. Morgan*, 107 Mass. 199. And the publication in a newspaper of rumors is not justified by the fact that such rumors existed; but such fact may be given in evidence in mitigation of damages. *Skinner v. Powers*, 1 Wend. 451. See *Sinford v.*

A communication disparaging to the character (*s*), and *prima facie* libellous, will be privileged, when made *bond fide* by the defendant, in the performance of some social or moral duty, or in the conduct of his own affairs, and with a fair and reasonable hope of protecting his own interest in a matter which concerns it, or where there is a corresponding interest in the party who receives the communication (*t*); words spoken by a member of parliament in his place are not actionable (*u*), nor is a fair, correct and *bond fide* report of proceedings in a public court (*x*), nor reasonable comment on a matter of public interest and concern (*y*); neither is a criticism, if it be fair, and do * not [* 135] contain slanderous observations unconnected with the work professed to be criticised (*z*). (490)

The mode of declaring in an action for defamation, whether libel or slander, has been simplified by the Common Law Procedure Act, 1852 (*a*), and by the

- (*a*) *Fray v. Fray*, 17 C. B. N. S. 603; *Walker v. Brogden*, 19 *Id.* 85. (a) 15 & 16 Vict. c. 76, s. 61.
 (*b*) *Whiteley v. Adams*, 15 C. B. N. S. 392; *Kelly v. Tinling*, L. R. 1 Q. B. 699;
Judgm. Toogood v. Spyrring, 1 Cr. M. & R. 198. *Kelly v. Sherlock*, *Id.* 686. See *Wason v. Walter*, 38 L. J., Q. B. 34.
 See *Coxhead v. Richards*, 2 C. B. 569. (*c*) *Frazer v. Berkeley*, 7 C. & P. 621; *Carr v. Hood*, 1 Camp. 354 n.
 (*u*) *Ante*, vol. i. p. 197. (*z*) *Ryalls v. Leader*, L. R. 1 Ex. 296.

Bennett, 24 N. Y. (10 Smith) 20; *Buckley v. Knapp*, 48 Mo. 152; *Snyder v. Fulton*, 34 Md. 128.

One who writes an article and employs another person, as his agent, to translate it into another language and publish it, will be liable, if the article, as published, is libellous, although the translation is inaccurate. *Wilson v. Noonan*, 27 Wis. 598. See *Keens v. Ruff*, 1 Clarke (Iowa), 482.

(490) Privileged communications are said to be of four kinds: 1. Whenever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests. 2. Any thing said or written by a master in giving the character of a servant who has been in his employment. 3. Words used in the course of a legal or judicial proceeding. 4. Publications duly made in the ordinary mode of parliamentary proceedings. *White v. Nichols*, 8 How. (U. S.) 266, 286. And see *Perkins v. Mitchell*, 31 Barb. 487; *Warner v. Paine*, 2 Sandf. 198; *Newfield v. Copperman*, 15 Abb. N. S. 380; *Kinck v. Colby*, 46 N. Y. (1 Sick.) 427.

To show the truth of the matter published is a complete defense in an action for libel as well as for slander; but it cannot be given in evidence unless it is pleaded, or notice thereof is given with the general issue. See cases cited in preceding note. It is held, however, that the defendant may give in evidence under the general issue, in mitigation of damages, any such facts as, without showing the truth of the charge, tend to show that the defendant believed it, and thus to rebut the presumption of malice. *Kennedy v. Dear*, 6 Port. (Ala.) 90; *Chapman v. Calder*, 14 Penn. St. 365; *Spooner v. Keeler*, 51 N. Y. (6 Sick.) 527; *Bisbey v. Shaw*, 12 N. Y. (3 Kern.) 67. Evidence of general bad character may be admitted under the general issue. *Taylor v. Richardson*, 29 Me. 323; *Smith v. Smith*, 8 Ired. (N. C.) 29.

The justification, when pleaded, must be as broad as the charge. *Bissell v. Cornell*, 24 Wend. 354; *Gregory v. Atkins*, 42 Vt. 237. Thus, if the charge is perjury, it will avail nothing to prove that the plaintiff swore falsely through an innocent mistake. *Fero v. Ruscoe*, 4 N. Y. (4 Comst.) 162; *Torrey v. Field*, 10 Vt. 353; *State v. Burnham*, 9 N. H. 84. The proof must be of willful and corrupt falsehood. *McKinly v. Rob.* 20 Johns. 351. So, a charge of committing one offense is not justified by showing the commission of another offense, although of the same or even greater enormity. *Andrews v. Van Deusen*, 11 Johns. 38; *Stow v. Converse*, 4 Conn. 17; *McOlintock v. Crick*, 4 Iowa, 458; *Smith v. Buckecker*, 4 Rawle (Penn.), 295; *Skinner v. Grant*, 12 Vt. 456. And where the libellous matter imputes a dishonest, corrupt, or criminal intent, a plea of justification must show not only the facts, but also the intent. *Gage v. Robinson*, 12 Ohio, 250.

stat. 6 & 7 Vict. c. 96, some material improvements with regard to it have been effected, the defendant in an action for slander or libel, giving notice in writing to the plaintiff at the time of pleading of his intention, may give in evidence, in mitigation of damages, that he made or offered an apology before the commencement of the action, or as soon afterwards as he had an opportunity, in case the action was commenced before (*b*). And in an action for a libel in a public newspaper, or other periodical publication, the defendant may plead that it was inserted without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted a full apology for it; or, if the newspaper or other periodical in which it appeared should be ordinarily published at intervals exceeding one week, had offered to publish the apology in any newspaper &c., to be selected by the plaintiff: and upon filing such plea, he may pay into court a sum of money by way of amends for the injury sustained by the publication of the libel (*c*).

3rdly. A third way of destroying or injuring a man's reputation is by preferring a malicious indictment or instituting a malicious prosecution against him; which, under the mask of justice and public spirit, is sometimes made the engine of private spite and enmity. For this the law has given a remedy, either by action for conspiracy (*d*), which cannot be brought but against two persons at the least; or, which is the more usual way, by an action on the case * for a false and malicious prosecution (*e*). The essential ground of which action is, that a legal prosecution was carried on without a probable cause; and this must be substantively and expressly proved, and cannot be implied. From the want of probable cause, malice, indeed, may be, and most commonly is, implied, and the knowledge of the defendant is also implied; but from the most express malice, the want of probable cause cannot be implied (*f*). (491) At the trial

(*b*) S. 1.

(*c*) S. 2; see 15 & 16 Vict. c. 76, s. 70; *Jones v. Mackie*, L. R. 3 Ex. 1.

(*d*) *Finch*, L. 305.

(*e*) F. N. B. 116.

(*f*) *Button v. Johnstone*, 1 T. R. 544; *per Parke, J.*, *Mitchell v. Jenkins*, 5 B. & Ad. 584; *Panton v. Williams*, 2 Q. B. 192; *Mitchell v. Williams*, 11 M. & W. 205.

(491) To maintain an action for malicious prosecution, and more especially in order to recover vindictive damages, the plaintiff must allege and prove that he has been prosecuted by the defendant, either criminally or in a civil suit, and that the prosecution is at an end; that it was instituted maliciously, and without probable cause; and that he has sustained damage thereby. 1 Hill. on Torts, 416; *Vanderbilt v. Mathis*, 5 Duer, 804; *Wheeler v. Nesbitt*, 24 How. (U. S.) 544; *Hall v. Suydam*, 6 Barb. 83; *Schofield v. Ferrers*, 47 Penn. St. 194; *Given v. Webb*, 7 Rob. 65; *Greenwade v. Mills*, 81 Miss. 464; *Driggs v. Burton*, 44 Vt. 124; *O'Brien v. Barry*, 106 Mass. 800; *Mitchinson v. Cross*, 58 Ill. 366; *Bauer v. Clay*, 8 Kan. 580; *Ritchey v. Davis*, 11 Iowa, 124. Proof of express malice is not enough, without showing also the want of probable cause (*Hall v. Suydam*, 6 Barb. 83; *Shafer v. Loucks*, 58 id. 426); nor want of probable cause without malice. *Ewing v. Sanford*, 21 Ala. 157; *McNess v. Herring*, 8 Tex. 151; *Payson v. Caswell*, 9 Shep. (Me.) 212; *Leidig v. Rawson*, 1 Scam. (Ill.) 272. Probable cause is defined to be a reasonable suspicion supported by circumstances sufficient to warrant a cautious man in the belief that the person accused is guilty of the offense charged. *Munns v. Nemours*, 8 Wash. C. C. 87; *Foshay v. Ferguson*, 2 Denio, 617; *Bacon v. Towne*, 4 Cush. (Mass.) 218; *Carl v. Ayres*, 53 N. Y. (8 Sick.) 18; see *Foot v. Milbier*, 1 Pars. Sup. Ct. 456; *Cole v. Curtis*, 16 Minn. 183; *Driggs v. Burton*, 44 Vt. 124; *Farnam v. Feeley*, 56 N. Y. (11 Sick.) 451. If want of probable cause be shown, the question of malice must be left to the jury. *Grinnell v. Stewart*, 20 How. 478; S. C., 12 Abb. 220; 32 Barb. 544.

of this action, it is the duty of the judge to inform the jury, if they find the facts proved, and the inferences to be warranted by such facts, that the same do or do not amount to reasonable or probable cause, so that the question of fact is for the jury, and the abstract question of law is for the judge (*g*).

In such an action, moreover, it is essential to show that the proceeding alleged to have been instituted maliciously and without probable cause, has terminated in favour of the plaintiff, if, from its nature, it were capable of such termination (*h*). But an action on the case for a malicious prosecution may be founded upon an indictment, whereon no acquittal can be had; as if it be rejected by the grand jury, or be *coram non judice*, or be insufficiently drawn. For it is not the danger of the plaintiff, but the scandal, vexation, and expense caused, upon which this action is founded. (492)

II. We are next to consider the violation of the right of personal liberty. This may be constituted, 1, by the injury of false imprisonment, or 2, by that of malicious arrest.

1. To constitute the injury of false imprisonment there are two points requisite; (1.) The detention of the person: * and (2.) The unlawfulness of such detention. Every confinement of the person is an [* 136]

1. False imprisonment.

imprisonment, whether it be in a common prison, or in a private house, or even by forcibly detaining one in the public streets (*i*). (493) Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority: which authority may arise either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment (*k*); or from some other special cause justified, for the necessity of the thing, either by common law, or act of parliament; such as the arresting of a felon by a private person without

(*g*) *Id.*

(*i*) 2 Inst. 589.

(*h*) *Baseé v. Matthews*, L. R. 2 C. P. 684, and cases there cited.

(*k*) 2 Inst. 52, 591.

(492) Where a party, knowing that a certain act does not constitute a crime, procures another to be indicted for a crime; or where he supposes and believes that such act, if done by another, would constitute a crime, and falsely and maliciously accuses such other of the commission of the act, and procures him to be indicted, an action for malicious prosecution lies. *Dennis v. Ryan*, 63 Barb. 145; S. C., 5 Lans. 350.

(493) An actual manual arrest is not necessary to constitute a false imprisonment. A demonstration looking to an arrest, which, to all appearances, can only be avoided by submission, operates as effectually, if submitted to, as if the arrest had been forcibly accomplished without such submission. *Brushaben v. Hegeman*, 22 Mich. 266. And see *Johnson v. Tompkins*, 1 Baldw. C. C. 601; *Smith v. The State*, 7 Humph. (Tenn.) 43; *Searle v. Viets*, 2 N. Y. Sup. Ct. (Thompson & Cook) 223; *Blower v. State*, 3 Sneed (Tenn.), 66; *Courtoy v. Dozier*, 20 Ga. 369. And if an officer who has not jurisdiction issue a warrant under which a party is arrested or imprisoned, all persons instrumental in procuring it are trespassers, and liable to an action for false imprisonment. *Lansing v. Case*, 4 N. Y. Leg. Obs. 221; see *Wait v. Green*, 5 Park. 185; *Gardner v. Buin*, 5 Lans. 256; *Smith v. Shaw*, 12 Johns. 257. As to the right to arrest without a legal warrant, under the constitutions of the United States and of the several States, see *Rohan v. Sawin*, 5 Cush. (Mass.) 285; *Wakely v. Hart*, 6 Binn. (Penn.) 116. In case of an actual felony, an officer or a private person may, without malice and upon probable cause, arrest a suspected person, without warrant, in order to bring him before a magistrate. *Brockway v. Crawford*, 3 Jones (N. C.), 433.

warrant, or the impressing of a mariner for the public service (*l*). False imprisonment also may arise by executing a lawful warrant or process at an unlawful time, as on a Sunday (*m*). Such is the injury. Let us next consider the remedy for it: which is of one or other of two sorts; the one removing the injury, the other compelling satisfaction for it.

The means of removing the actual injury of false imprisonment known in very early times to our common law were fourfold. (1). By writ of mainprize. (2). By writ *de odio et atid*. (3). By writ *de homine replegiando*. (4). By writ of *habeas corpus*. Of these writs, the first three mentioned are either abolished, or have become obsolete, and our remarks respecting them will therefore be very brief.

(1). The writ of mainprize (*n*), *manucaptio*, though now disused, is often mentioned in the old reports, and may be directed to the sheriff (either generally, when any man is imprisoned for a bailable offence, and bail has been refused; or specially, when the offence or cause of commitment is not properly bailable below), commanding him to take sureties [* 138] for the prisoner's appearance, usually * called "mainpernors," and to set him at large (*o*). Mainpernors differ from bail, in that a man's bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither, but are barely sureties for his appearance at the day; bail are only sureties, that the party be answerable for the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever (*p*).

(2). The writ *de odio et atid* was anciently directed to the sheriff, commanding him to inquire whether a prisoner charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam*, for hatred and ill-will; and if upon the inquisition due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail. This writ, according to Bracton (*q*), was not to be denied to any man (*r*).

(3). The writ *de homine replegiando* (*s*) lay to replevy a man out of prison, or out of the custody of any private person, upon giving security to the sheriff that the man should be forthcoming to answer any charge against him. And if the person were conveyed out of the sheriff's jurisdiction, the sheriff might have returned that he was eloiigned, *elongatus*: upon which a process issued (called a *capias in withernam*) to imprison the defendant himself, without bail or mainprize, till he should produce the party. This [* 139] writ, however, was guarded by so many exceptions (*t*), * that it was not an effectual remedy in many cases, especially where the crown

(*l*) Broom's Const. L. pp. 116—118.

(*m*) Stat. 29 Car. 2, c. 7, s. 6.

(*n*) As to which see *Crovelly's Case*, 2 Swanst. 1.

(*o*) F. N. B. 250; 1 Hale, P. C. 141; Coke on Bail and Mainp. ch. 10.

(*p*) Coke on Bail and Mainp. ch. 3; 4 Inst. 179.

(*q*) L. 3, tr. 2, c. 8.

(*r*) See *Magna Carta*, c. 28, and stat. West. 2, 13 Edw. 1, c. 29. The statute of Gloucester, 6 Edw. 1, c. 9, restrained the use of this writ in the case of killing by misadventure or in self-defence, and the 28 Edw. 3, c. 9,

abolished it altogether: but as 42 Edw. 3, c. 1, repealed all statutes then in being, contrary to the great charter, sir Edward Coke thought that the writ *de odio et atid* was thereby revived (3 Inst. 48, 53, 315). This latter statute was however itself repealed by the 26 & 27 Vict. c. 125.

(*s*) F. N. B. 66.

(*t*) *Nisi captus est per speciale preceptum nostrum, vel capitalis iudicarii nostri, vel pro morte hominis, vel pro foresta nostra, vel pro aliquo alio recto, quare secundum consuetudinem Angliæ non sit replegiabilis.* (Registr. 77.)

was concerned. The incapacity therefore of these three remedies to give complete relief in every case gradually antiquated them; and caused a general recourse to be had, in behalf of persons aggrieved by illegal imprisonment, to

(4). The writ of *habeas corpus*, the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another for the more easy administration of justice. Such is the *habeas corpus ad respondendum*, now unnecessary, but which was formerly used when a man had a cause of action against one who was confined by the process of some inferior court, in order to remove the prisoner, and charge him with the new action in the court above. Such is that *ad satisfaciendum*, when a prisoner has had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him in execution (*u*). Such also are those *ad prosequendum*, *testificandum*, *deliberandum*, &c. (*x*); which issue when it is necessary to remove a prisoner, in order to prosecute, or bear testimony in any court, or to be tried in the proper jurisdiction. Such also is the writ *ad faciendum et recipiendum*, which issued out of one of the courts at * Westminster, when a person, sued in some inferior jurisdiction, [* 140] was desirous to remove the action into the superior court; it commanded the inferior judge to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ was frequently denominated a *habeas corpus cum causâ*) to do and receive whatsoever the court should consider in that behalf. The writ in question was available to bring up a defendant who was actually or constructively in the custody of an inferior court; and inasmuch as by the statute 1 & 2 Vict. c. 110, a defendant can no longer be held to bail in such a court, the writ of *habeas corpus cum causâ* can in general be no longer used (*y*).

But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. This is a high prerogative writ, and therefore at common law issuing out of the court of queen's bench not only in term time, but also during the vacation (*z*), and running into most parts of the queen's dominions: for the queen is at all times entitled to have an account, why the liberty of any of her subjects is restrained, wheresoever that restraint may be inflicted. Formerly, indeed, if the party were privileged in the court of common pleas or exchequer, as being (or supposed to be) an officer or suitor of the court, a *habeas corpus ad subjiciendum* might also by

(*u*) This writ, however, need not be sued out against one who is already in the prison of the court, 15 & 16 Vict. c. 78, s. 127.

(*x*) By stat. 48 Geo. 3, c. 140, and 44 Geo. 3, c. 102, the *habeas corpus ad testificandum* has been rendered more efficient. By the first, a judge may award the writ for the purpose of bringing any prisoner from any gaol in England or Ireland as a witness, before any court martial, commissions of bankrupt, or for auditing public accounts, or other commissioners, under any commission or war-

rant from the crown (the statute has the same application to the *habeas corpus ad deliberandum*). By the other statute, a similar power is given for bringing up any prisoner as a witness before any of the courts, or any justice of oyer and terminer, or gaol delivery, or sitting at *nihi prius*, in England or Ireland.

(*y*) 2 Chitt. Pr. 11th ed. 1809.

(*z*) See *Leonard Watson's Case*, 9 Ad. & E. 791.

common law have been awarded from thence (a); and, if the cause of imprisonment were palpably illegal, such court might have discharged him (b): but, if [*141] he were committed for any *criminal matter, they could only have remanded him, or taken bail for his appearance in the queen's bench (c), which occasioned the common pleas for some time to discountenance such applications. But since the mention of the queen's bench and common pleas, as co-ordinate in this jurisdiction, by statute 16 Car. 1, c. 10, every subject of the kingdom has been held to be equally entitled to the benefit of the common law writ, in either of those courts, at his option; and it may now issue out of the court of exchequer, under the 56 Geo. 3, c. 100, s. 2 (d).

It is necessary to apply for a *habeas corpus* by motion to the court, as in the case of other prerogative writs which do not issue as of mere course, without showing some probable cause why the extraordinary power of the crown is called in to the party's assistance. For, as was argued by lord chief justice Vaughan (e), "it is granted on motion, because it cannot be had of course; and there is therefore no necessity to grant it; for the court ought to be satisfied that the party hath a probable cause to be delivered." And this seems the more reasonable because (when once granted) the person to whom it is directed must, at the risk of an attachment being issued against him, bring up the body of the prisoner, or show that he is unable to do so. So that if the writ issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or seaman in the queen's service, or one committed for contempt or confined for insanity, might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded when brought up to the court. And therefore sir Edward Coke, when chief justice, did not scruple in 13 Jac. 1, to deny a *habeas corpus* to one confined by the court of admiralty [*142] *for piracy; there appearing, upon his own showing, sufficient grounds to confine him (f). On the other hand, if a probable ground be shown, that the party is imprisoned without just cause (g), and therefore has a right to be delivered, the writ of *habeas corpus* is then a writ of right, which "may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other (h)."

In a former part of these Commentaries (i) we expatiated at large on the personal liberty of the subject. This was shown to be a natural inherent right, which could not be surrendered or forfeited, unless by the commission of some offence against society, and which ought not to be abridged in any case without the special permission of law. A doctrine coeval with the first rudiments of the English constitution, and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest: asserted afterwards and confirmed by the conqueror himself and his descendants; and though sometimes impaired by the ferocity of the times, and the occasional despotism of jealous or usurping

(a) 2 Inst. 55; 4 Id. 290; 2 Hale P. C. 144.

(b) *Bushell's Case*, 6 St. Tr. 1021.

(c) Carter, 221; 2 Jones, 13.

(d) See also 1 & 2 Vict. c. 45, which equalises the jurisdiction at judge's chambers, and is applicable, *inter alia*, to the granting of the writ of *habeas corpus*. Corner Cr. Off. Pr. 112.

(e) *Bushell's Case*, 2 Jones, 13.

(f) 3 Bulstr. 27.

(g) 2 Inst. 615.

(h) Com. Journ. 1 Apr. 1628.

(i) Vol. I. ch. 1.

princes, yet established on the firmest basis by the provisions of *Magna Carta*, and a succession of statutes affirming them. To assert an absolute exemption from imprisonment in all cases, would be inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible: but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. This it is, which induces the absolute necessity of expressing upon every commitment the reason for which it is made: so that the court upon a *habeas corpus* may examine *into its validity; and, according to the circumstances of the case, [* 143] may discharge, admit to bail, or remand the prisoner.

And yet, early in the reign of Charles I. the court of king's bench, professing to rely on some arbitrary precedents, declared that they could not upon a *habeas corpus* either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council (*k*). But the petition of right, 3 Car. 1, c. 1, which recites this illegal judgment, enacts that no freeman shall thenceforth be so imprisoned or detained. When, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of the king's special command under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they however annexed a condition of finding sureties for the good behaviour, which still protracted the imprisonment; the chief justice, sir Nicholas Hyde, at the same time declaring (*l*), that if the prisoner were again remanded for that cause, perhaps the court would not afterwards grant a *habeas corpus*, being already made acquainted with the cause of the imprisonment. But this was heard with indignation and astonishment by every lawyer present; according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four-and-twenty years (*m*).

* These pitiful evasions gave rise to the statute 16 Car. 1, c. 10, [* 144] enacting (s. 8), that if any person be committed by the sovereign in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without delay upon any pretence whatsoever, a writ of *habeas corpus*, upon which the legality of such commitment shall be examined, and justice shall be done by delivering, bailing, or remanding such prisoners. Yet still in the case of Jenkes, who in 1676 was committed by the king in council, for a turbulent speech made by him on the hustings at Guildhall (*o*), new shifts and devices were made use of to prevent his enlargement by law, the chief justice (as well as the chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to allow process to issue, whereby the prisoner was discharged. Other abuses had also crept into daily practice, which in some measure defeated the benefit of this

(*k*) *Darnel's Case*, 3 St. Tr. 1; Broom's Const. L. 162.

(*l*) St. Tr. iii. 289.

(*m*) *Etiam judicium tunc primarius, nisi illud faceremus, rescripti illius forensis, qui libertatis personae omnimoda vindex legitimus est fere solus, usum omnimodum palam*

pronuntiavit (cui semper similis) nobis perpetuo in posterum denegandum. Quod, ut odiosissimum juris prodigium, scientioribus hic universis censuit. (Vindic. Mar. Claus. edit. A. D. 1653.)

(*o*) St. Tr. vi. 1189.

great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party; and other vexatious shifts were practised to detain state prisoners in custody. To repress these was passed the Habeas Corpus Act, 31 Car. 2, c. 2, intituled "An act for the better securing the liberty of the subject, and for prevention of imprisonments beyond the seas."

This statute enacts, 1. That on complaint and request in writing by or on behalf of any person committed and charged with any crime (unless committed for treason or felony expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any felony, or upon suspicion of such felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process), the lord chancellor, or any of the twelve [*145] judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 2. That such writ shall be indorsed, as granted in pursuance of this act, and signed by the person awarding it. 3. That the writ shall be returned and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority (specified in the act), shall for the first offence forfeit 100*l.*, and for the second offence 200*l.* to the party grieved, and be disabled to hold his office. 5. That no person once delivered by *habeas corpus* shall be recommitted for the same offence, on penalty of 500*l.* 6. That every person committed for treason or felony shall, if he requires it the first week of the next term, or the first day of the next session of *oyer* and *terminer*, be indicted in that term or session, or else admitted to bail: unless the witnesses for the crown cannot be produced at that time: and if acquitted, or if not indicted and tried in the second term, or session, he shall be discharged from his imprisonment for such imputed offence: but that no person, after the assizes shall have opened for the county in which he is detained, shall be removed by *habeas corpus*, till after they are ended; but shall be left to the justice of the judges of assize. 7. That any such prisoner may move for and obtain his *habeas corpus*, as well out of the chancery or exchequer, as out of the king's bench or common pleas; and [*146] the lord chancellor or judges *denying the same, on sight of the warrant or oath that the same is refused, forfeit severally to the party grieved the sum of 500*l.* 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey (*p*). 9. That no inhabitant of England (except a person

(*p*) The writ runs also to the Isle of Man. *Re Brown*, 83 L. J., Q. B. 198. It does not, however, run into "any colony or foreign dominion of the crown where her Majesty has a lawfully established court or courts of

justice having authority to grant and issue the said writ, and to ensure the due execution thereof throughout such colony or dominion." 25 & 26 Vict. c. 20, s. 1.

contracting, or a convict praying, to be transported; or having committed some capital offence in the place to which he is sent) shall be sent prisoner to Scotland, or any place beyond the sea, within or without the dominions of the crown; on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum of 500*l.* to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of *præmunire*; and shall be incapable of receiving pardon from the crown.

Such is the substance of this great and important statute: which extends (we may observe) only to the case of a commitment for a criminal charge such that no inconvenience can be caused to public justice by a temporary enlargement of the prisoner: other cases of unjust imprisonment having formerly been left to the *habeas corpus* at common law. Now, however, a person confined "otherwise than for some criminal or supposed criminal matter," except he be imprisoned for debt, or by process in any civil suit, may avail himself of the statute 56 Geo. 3, c. 100, intituled, "An Act for more effectually securing the liberty of the subject," and providing as under (*q*):—

That a judge of any of the superior law courts, if it shall appear by affidavit or affirmation (when allowed), that there is probable and reasonable cause for doing so, shall award a writ of *habeas corpus* in vacation, returnable * immediately. That wilful disobedience of the writ shall be deemed [*147] a contempt of court, and the judge before whom it is returnable may bind the offender to appear in court in the ensuing term to answer the contempt, or, on his refusal to give security, may commit him to prison. That a writ awarded late in the vacation may be made returnable in court, and one awarded by the court in term may be made returnable before a judge in vacation. That the truth of the return may be examined into by affidavit. That the provisions for making the writ returnable in term or vacation, and making disobedience to it a contempt of court, shall extend to writs awarded under the statute 31 Car. 2, c. 2.

By the admirable regulations above set forth, the remedy for removing the injury of unjust and illegal imprisonment may now be regarded as complete, and besides the efficacy of the writ of *habeas corpus*, in liberating the subject from illegal confinement in a public prison, it also extends its influence to remove every unjust restraint of personal freedom in private life, though imposed by a husband on his wife, or by a father on his child; but when a feme covert or an infant is brought before the court by *habeas corpus*, the court will only set such person free from an unmerited or unreasonable confinement, and will not determine the validity of a marriage, or the right to the guardianship of an infant. Though if a child is too young to have any discretion of its own, the court will deliver it into the custody of its parent or of the person who appears to be its legal guardian (*r*). (494)

(*q*) Se. 1—4, 6.

(*r*) See *per* Lord Mansfield, 8 Burr. 1434.

(494) See, generally on subject of "*habeas corpus*," 2 Kent's Com. 26; 5 Wait's Pr. 501 *et seq.*; Cooley's Const. Lim. 845. Congress has vested in the courts of the United States full authority to issue the writ of *habeas corpus* in cases falling properly within the jurisdiction of the national government. See *Ex parte Bollman, etc.*, 4 Cranch 75; 1 U. S. Stat. at Large, 81; 4 id. 634; 5 id. 539; 14 id. 385. The constitutions of the several States recognize the writ as an existing remedy, and designate the courts and officers that may issue it;

The remedy by which to compel satisfaction for false imprisonment, is an action of trespass, which is generally and almost unavoidably, accompanied with a charge of assault and battery: and therein the party may recover damages for the injury which he has sustained. (495)

[* 148] Throughout these Commentaries, states of facts will, * from time to time, be found indicated, rendering justifiable the restraint of a man's person otherwise than in virtue of process, criminal or civil, or in pursuance of statutory provisions. Thus a private person may lawfully interpose to put a stop to a breach of the peace, and may arrest any of the queen's subjects who are engaged in it (*t*). So where a felony has been committed, a person suspected on reasonable and probable cause of having committed it may lawfully be arrested and imprisoned, in order that a criminal charge may be preferred against him; and if such charge prove groundless, and an action be afterwards brought at suit of the party charged against the person who caused him to be apprehended, the issue may substantially be of this kind—had the defendant reasonable and probable cause for giving the plaintiff into custody as the offender? Should it appear that he did so without availing himself of a ready and obvious mode of ascertaining the truth, the absence of inquiry by the defendant will be an element in determining as to the existence of reasonable and probable cause for the arrest (*u*).

2. The action for a malicious arrest is a remedy available where legal process has maliciously, and without reasonable or probable cause, been put in force (*x*). To support this action, it must be shown that the former suit or proceeding was determined in the plaintiff's favour (*y*). (496)

(*t*) *Price v. Seeley*, 10 Cl. & F. 28.

(*u*) *Perryman v. Lister*, L. R. 3 Ex. 197.

(*x*) *Churchill v. Siggers*, 3 E. & B. 929, 937;

Haffer v. Allen, L. R. 2 Ex. 15.

(*y*) *Watkins v. Lee*, 5 M. & W. 270.

but the cases in which it may be employed are left to be ascertained from the common law and the statutes. See *Matter of Jackson*, 15 Mich. 417; *Cooley's Const. Lim.* 847.

A State judge has no jurisdiction to issue the writ, or to continue proceedings under it, when issued for the discharge of a person held under the authority, or claim and color of the authority, of the United States by an officer of that government. *Ableman v. Booth*, 21 How. (U. S.) 506; *Tarble's Case*, 13 Wall. (U. S.) 397. See *Spangler's Case*, 11 Mich. 298; *In re Hopson*, 40 Barb. 84; *Ex parte Hill*, 5 Nev. 154; *Norris v. Newton*, 5 McLean's C. C. 92. And no court in the United States, nor any judge thereof, can, by *habeas corpus*, bring up one committed under a sentence or execution of a State court, except for the purpose of testifying. *Ex parte Dorr*, 3 How. (U. S.) 103; *Johnson v. United States*, 3 McLean's C. C. 89. And see *Robb v. McDonald*, 29 Iowa, 330; S. C., 4 Am. Rep. 211; *Ex parte Kearney*, 7 Wheat. (U. S.) 88; *Lockwood v. State*, 1 Carter (Ind.), 161; *Ex parte McKee*, 18 Mo. 599. As to the employment of the writ to enable a parent to obtain the custody and control of a child, see *People v. Mercein*, 3 Hill, 399; *Adams v. Adams*, 1 Duv. (Ky.) 167; *In re Goode-nough*, 19 Wis. 274.

(495) Trespass is the proper, but not the exclusive form of an action for false imprisonment. See *Stanton v. Seymour*, 5 McLean, 267; *Sleight v. Ogle*, 4 E. D. Smith, 445.

(496) So, the plaintiff must not only prove malice, but must also show that there was no probable cause for the prosecution; and the defendant is not bound to prove probable cause until the plaintiff has shown the absence of it; and if the plaintiff show malice, and not the want of probable cause, the defendant cannot be condemned, as it is just as necessary to show the want of probable cause as it is malice before a recovery can be had. *Barton v. Kavanaugh*, 12 La. Ann. 332. See *Brant v. Higgins*, 10 Mo. 723; *Ross v. Innis*, 26 Ill. 259.

III. With regard to the third absolute right of individuals, *viz.*, that of holding private property; though the enjoyment of it when acquired is strictly a personal right, yet as its nature and origin, and the means of its acquisition or loss, fell more directly under our second general division, of the rights of things; and as, of course, the wrongs that affect these rights must be referred to the * corresponding division in the [* 149] present volume of our Commentaries; it will be more commodious and easy to consider together, rather than in a separate view, the injuries that may be offered to the enjoyment, as well as to the rights, of property. And therefore I shall here conclude the head of injuries affecting the absolute rights of individuals.

We are next to contemplate wrongs which affect relative rights; or such as are incident to persons considered as members of society, and connected with each other by various ties and relations; and, in particular, such injuries as may be done to persons under the four following relations:—I. Husband and wife; II. Parent and child; III. Guardian and ward; IV. Master and servant (*x*).

I. Injuries which may be offered to a person, considered as a husband, and which are cognizable in a court of common law, are principally three: 1, abduction,

I. Husband and wife.

tion, or taking away a man's wife; 2, beating her; and 3, indirectly causing her some personal hurt, by negligence or otherwise.

1. Abduction.

1. As to the first sort, abduction, or taking her away, this may either be by fraud or persuasion, or open violence; though the

law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by action of trespass (*a*); and the husband is also entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him without a sufficient cause. (497) The old law was so strict in this point, that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned (*b*): but a stranger might carry her behind him on horseback to market, to a jus-

2, 3. Battery.

tice of the peace for a warrant against her husband, or * to [* 150] the spiritual court to sue for a divorce (*c*). 2, 3. The

Hurt caused by negligence.

second and third injuries, above mentioned, are constituted by beating a man's wife, or otherwise ill-using her; or causing hurt to her by negligence (*d*). For a common assault upon, or battery, or imprisonment of, the

(*a*) As to these relations, see Vol. i. chaps. 14—17.

(*a*) *Norris v. Seed*, 3 Exch. 782.

(*b*) Bro. Abr. tit. *Trespass*, 218.

(*c*) Ib. 207, 440.

(*d*) See *Longmeid v. Holliday*, 6 Exch. 761.

(497) The gist of an action by a husband for enticing away his wife is the loss, without justifiable cause, of her comfort, society and services. In such an action the plaintiff must give evidence, both that the loss was not occasioned by the voluntary act of the wife upon justifiable cause, and that it was occasioned by the defendant, without any real cause, and in bad faith toward the plaintiff. *Barnes v. Allen*, 1 Abb. Ct. App. 111; S. C., 1 Keyes, 390; *Campbell v. Carter*, 6 Abb. N. S. 151. The material point of inquiry is the intent with which the defendant has acted. *Schuneman v. Palmer*, 4 Barb. 235; *Hutchinson v. Peck*, 5 Johns. 196; *Turner v. Estes*, 3 Mass. 317. In order to sustain the action it is not essential that actual desertion be shown. *Heermance v. James*, 32 How. 142; S. C., 47 Barb. 120. See *Hoard v. Peck*, 56 Id. 202.

wife, the law gives the usual remedy to recover damages, by action of trespass, which must be brought in the names of the husband and wife jointly: but if the beating or maltreatment be so enormous, that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a separate remedy by action for this ill-usage, *per quod consortium amisit*; in which he may recover a satisfaction in damages (*e*). (498) By a provision of the C. L. Proc. Act, 1852 (*f*), in an action by husband and wife jointly for an injury to the wife, the husband is now allowed to add a claim in his own right — as for the loss of the wife's society — or where a joint trespass and assault have been committed on the husband and his wife.

II. The relation of parent and child is regarded by our law as in some respects analogous to that of master and servant, and hence an action is maintainable at suit of the parent for the seduction of his daughter (*g*); or for enticing away his daughter without debauching her (*h*); or, generally, for battery of a child (*i*): provided that in each of these cases some loss of service, actual or constructive, can be shown (*k*); and in any such action damages are recoverable proportionate to the injury inflicted (499).

- (*e*) *Hyde v. Scissor*, Cro. Jac. 538.
 (*f*) S. 40.
 (*g*) *Terry v. Hutchinson*, L. R. 3 Q. B. 599;
Chamberlain v. Hazlewood, 5 M. & W. 515;
Irwin v. Dearman, 11 East, 23.
 (*h*) *Evans v. Walton*, L. R. 2 C. P. 615.
 (*i*) *Mary's Case*, 9 Rep. 113; *Hall v. Hollander*, 4 B. & C. 663; *Eager v. Grimwood*, 1 Exch. 61.
 (*k*) *Grinnell v. Wells*, 7 M. & Gr. 1038, and cases *supra*.

(498) See *McKinney v. Western, etc.*, 4 Iowa, 420; *Olmstead v. Brown*, 12 Barb. 657; *Brown v. Fitz*, 13 N. H. 283; *Barnes v. Hurd*, 11 Mass. 59. As to the cases in which the action for injury to the wife should be brought by the husband and wife jointly, see *Johnson v. Dicken*, 25 Mo. 580; *McKinney v. Western, etc.*, 4 Iowa, 420; *Starbird v. Frankfort*, 35 Me. 89; *Sanford v. Augusta*, 32 id. 536; *Keeney v. Good*, 21 Penn. St. 349. A husband and wife cannot jointly sue for a joint slander or libel upon both. The husband should sue alone for the injury to him, and the husband and wife should join for the injury to her. *Gazynski v. Colburn*, 11 Cush. (Mass.) 10; *Hart v. Crow*, 7 Blackf. (Ind.) 351. A general distinction made is, that when words spoken of the wife are only actionable on proof of special damage, the husband must sue alone; but where they are actionable *per se*, she may unite with her husband in bringing the suit. *Williams v. Holdredge*, 22 Barb. 396; 2 Hill. on Torts, 504. In New York a wife cannot maintain an action against her husband for slander (*Freethy v. Freethy*, 42 Barb. 641); nor for an assault and battery. *Longendyke v. Longendyke*, 44 id. 366. And see *Perkins v. Perkins*, 62 id. 531; S. C., 7 Lans. 19.

An action lies in favor of the husband for criminal conversation with, or seduction, of his wife, and the remedy may be trespass or case. *Parker v. Elliott*, 6 Munf. (Va.) 587; *Van Vacter v. McKillip*, 7 Blackf. (Ind.) 578. The latter is the more usual form of action. 2 Hill. on Torts, 507.

(499) The principle is well settled by American authorities that where there is an actual or constructive service, that is, where the child actually performs service, or where the parent is legally entitled to and has the right to require such service if he thinks fit, the cause of action for the seduction of an infant daughter exists. *Mulvehall v. Millward*, 11 N. Y. (1 Kern.) 343; *Hornketh v. Bare*, 8 Serg. & Rawle (Penn.), 86; *Mercer v. Walmsley*, 5 Har. & Johns. (Md.) 27; *Gray v. Durland*, 50 Barb. 100; S. C. affirmed, 51 N. Y. (6 Sick.) 424; *Bolton v. Miller*, 6 Ind. 262; *Boyd v. Byrd*, 8 Blackf. (Ind.) 113. And a mother, in case of the father's death, may maintain the action. *Gray v. Durland*, 51 N. Y. (6 Sick.) 424; *Simpson v. Buck*, 5 Lans. 337. Thus where a minor daughter, whose father is dead, is seduced while in the employment of another, under an agreement made by the mother (the daughter receiving the pay for her services and applying it to her own use, with the assent of the mother), and after such seduction returns to the mother, who cares for her

Further, under the stat. 9 & 10 Vict. c. 93, intituled "An Act for *compensating the families of persons killed by accidents," an injury [* 151] to the relation of parent and child has been made actionable, which, by our common law, was not remediable; for thereby it is enacted, "that whenssoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony" (l). (500) And further, that "every such action shall be for the benefit of the wife, husband, parent (m), and child (n) of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct" (o).

An action under the above statute must be commenced within twelve calendar months after the death occurred (p), and damages may be

(l) S. 1. The statute 9 & 10 Vict. ch. 95, is amended as regards some not very important particulars by the 27 & 28 Vict. c. 95.

(m) By sect. 5, the word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and step-mother.

(n) By sect. 5, the word "child" shall

include son and daughter, and grandson and granddaughter and stepson and stepdaughter.

An illegitimate child is not within the above section: *Dickinson v. North Eastern R. Co.*, 2 H. & C. 785.

(o) S. 2.

(p) S. 8.

during her confinement and pays the expenses thereby incurred, the mother can maintain an action against the seducer for the injury. *Furman v. Van Sise*, 56 N. Y. (11 Sick.) 435. But see dissenting opinion of ALLEN, J., id. 440, where the English and American cases are carefully examined.

A father may maintain an action for the seduction of his daughter over twenty-one years of age, provided she is in his service at the time of her seduction. *Millar v. Thompson*, 1 Wend. 447; *Keller v. Donnelly*, 5 Md. 211; *Kendrick v. McCrary*, 11 Ga. 603; *Lipe v. Eisenlerd*, 33 N. Y. (5 Tiff.) 229. But she must be *actually* in his service. *Nicholson v. Stryker*, 10 Johns. 115. A guardian, master, or other person, standing in *loco parentis* to the person seduced may sustain the action. See *Ball v. Bruce*, 21 Ill. 161; *Bracy v. Kibbe*, 31 Barb. 273.

Pregnancy is the ordinary injurious result which furnishes the ground of action; but it will also lie for communicating to a daughter a venereal disease which disabled her from labor (*White v. Nellis*, 31 N. Y. [4 Tiff.] 405); and it lies, although neither pregnancy nor sexual disease has resulted therefrom, provided the proximate effect was any incapacity to labor. *Abrahams v. Kidney*, 104 Mass. 222; *Vanhorn v. Freeman*, 1 Halst. (N. J.) 822; see *Knight v. Wilcox*, 14 N. Y. (4 Kern.) 413.

Exemplary damages may always be allowed in actions on the case for seduction, whether the suit be brought by the parent of the person seduced, or by a person suing as master who is not also her parent. *Ingersoll v. Jones*, 5 Barb. 661; *Lee v. Hodges*, 13 Gratt. (Va.) 726.

(500) Similar statutes have been enacted in many of the States of the United States. See ante, 108, note 483.

recovered in it commensurate with the pecuniary loss caused by the defendant (*q*).

[* 152] * III. Injuries to the relation of guardian and ward are usually redressed in equity (*r*), though in strictness an action (formerly not uncommon) would still be maintainable at suit of a guardian for taking away his ward (*s*); it will lie also for her seduction if he be *in loco parentis* (*t*).

IV. To the relation between master and servant, and the rights accruing therefrom, there are two species of injuries incident. The one is, retaining a man's hired servant before his time is expired; the other is beating him, causing him personal hurt, or confining him so that he is not able to perform his work. As to the first, the retaining another person's servant during the time he has agreed to serve his present master; this, as it is an ungentlemanlike, so it is also an illegal act. For every master has by his contract purchased for a valuable consideration the service of his domestics for a limited time: the inveigling or hiring his servant, which induces a breach of his contract, whether done maliciously or with notice after existence of the relation, is therefore an injury to the master; and for that injury the law has given him a remedy by action (*u*); and the master may also have an action against the servant for the non-performance of his agreement. The other injury is that of beating, confining, or disabling a man's servant, which depends upon the same principle as the last; *viz.*, the property which the master has by his contract acquired in the labour of the servant. In this case, besides the remedy by action for battery, bodily hurt, or imprisonment, which the servant himself, as an individual, may have against the aggressor, the master also, to compel a recompence for his immediate * loss, may maintain an action, in which he must allege and [* 153] prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit* (*x*); and in which the jury will make him a proportionable pecuniary satisfaction. If, however, bodily hurt were caused to the servant by the defendant, whilst performing his contract with the servant, *ex gr.*, as a carrier of passengers for hire, and there be no privity between the defendant and the master, an action at suit of the latter will not lie (*y*).

We may observe that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantage accruing therefrom: while the loss of the inferior by such injuries is, except where the death of a parent has been caused by negligence (*z*), unregarded. One reason for which

(*q*) *Dalton v. South Eastern R. C.*, 4 C. B., N. S. 296.

Satisfaction made to the deceased will, however, afford an answer to the action. *Read v. Great Eastern R. C.*, L. R. 3 Q. B. 555.

(*r*) *Ante*, p. 77.

(*s*) See *Evans v. Walton*, L. R. 2 C. P. 615, citing *Barham v. Dennis*, Cro. Eliz. 770; 2 P.

Wms. 108; *Gilbert v. Schwenck*, 14 M. & W. 488.

(*t*) See *Irwin v. Dearman*, 11 East, 23.

(*u*) *Lumley v. Gye*, 2 E. & B. 216.

(*x*) *Mary's Case*, 9 Rep. 118.

(*y*) *Alton v. Midland R. C.*, 19 C. B., N. S. 213.

(*z*) *Ante*, p. 150.

may be, that the inferior has no kind of property in the company, care, or assistance of the superior, as the superior is held to have in that of the inferior; and therefore the inferior can, in contemplation of law, suffer no loss consequential on a wrongful act done to his superior. The wife cannot recover damages for the beating of her husband. The child has no property in his father or guardian. And the servant, whose master is disabled, does not thereby lose his maintenance or wages. He had no property in his master; and if he receives his part of the stipulated contract he suffers no injury, and is therefore entitled to no action, for any battery or imprisonment which such master may happen to endure.

* CHAPTER IX.

[*154]

JURISDICTION OF SUPERIOR COURTS AT LAW.

BREACHES OF CONTRACT.

IN the preceding chapter we considered wrongs which affect the rights of persons, viewed either as individuals, or as related to each other; and are now to enter upon the discussion of such wrongs and breaches of contracts as directly or indirectly affect the rights of property, together with the remedies which the law has given to repair or redress them.

We shall first enquire respecting breaches of contract unauthenticated by deed; of bonds and covenants we have treated in our preceding volume.

A simple contract may be defined to be "an agreement or undertaking upon consideration, to do or not to do a particular thing." (501) From which

(501) Both verbal and written contracts are included in the class of simple contracts, and the only distinction between them, at common law, is in regard to the mode of proof. 1 Story on Cont., § 2; *Thacher v. Dinsmore*, 5 Mass. 301; *Union Turnpike Co. v. Jenkins*, 1 Caines, 387; *Perrine v. Cheeseman*, 6 Halst. (N. J.) 174; *People v. Shall*, 9 Cow. 778; *Bal-lard v. Walker*, 8 Johns. Cas. 65. See *Justice v. Long*, 42 N. Y. (3 Hand) 498; S. C. again, 52 N. Y. (7 Sick.) 323; *Hunt v. Reynolds*, 9 R. I. 303. Among American definitions of a simple contract are the following: An agreement in which a party undertakes to do or not to do a particular thing. MARSHALL, C. J., *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 197. An agreement between two or more parties to do or not to do a particular thing. TANEY, C. J., *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 572. A compact between two or more parties. MARSHALL, C. J., *Fletcher v. Peck*, 6 Cranch (U. S.), 87, 136. An agreement of two or more persons, upon sufficient consideration, to do or not to do a particular thing. 2 Kent's Com. 450. An agreement between two or more parties for the doing or not doing of some specified thing. 1 Pars. on Cont. 5. A deliberate engagement between competent parties, upon a legal consideration, to do or to abstain from doing some act. 1 Story on Cont. 1. A mutual promise, upon lawful consideration or cause, which binds the parties to a performance. Webster.

A precise and explicit exposition of the necessary ingredients of a simple contract is thus given by Comyn: 1st. A person able to contract; 2d. A person able to be contracted with; 3d. A thing to be contracted for; 4th. A good and sufficient consideration; 5th. Clear and explicit words to express the contract; 6th. The assent of both contracting parties. Comyn on Cont. 2. Approved in *Justice v. Lang*, 42 N. Y. (3 Hand) 498; 1 Story on Cont. 1, note. See 1 Wait's Law & Pr. 81, 82.

Simple contract, definition there arise three points to be contemplated in every contract; 1st. The agreement or undertaking; 2ndly. The consideration; and 3rdly. The thing to be done or not to be done.

First, then, a contract is an agreement, a mutual bargain or convention; and to constitute it there must be at least two parties consenting and competent to contract: (502) as where A. contracts with B. on some sufficient consideration, as to which we shall presently enquire, to pay him 100*l.*, and thereby transfers a property in such sum to B. Which property is however not in possession, but in action merely, and recoverable by suit at law.

(502) Idiots and lunatics, on account of personal disability, are incapable of entering into binding contracts (see *Emery v. Hoyt*, 46 Ill. 258; *Baldwin v. Duntun*, 40 id. 188; *Young v. Stevens*, 48 N. H. 135; *Dennett v. Dennett*, 44 id. 531; *Somes v. Skinner*, 16 Mass. 348; *Rice v. Peet*, 15 Johns. 503; *Lincoln v. Buckmaster*, 32 Vt. 652); and so are drunkards. *State Bank v. McCoy*, 69 Penn. St. 204; S. C., 8 Am. Rep. 246; *Caulkins v. Fry*, 35 Conn. 170; *French v. French*, 8 Ohio, 214; *Jenners v. Howard*, 6 Blackf. (Ind.) 240. But it has been held, that where a contract has been entered into, under circumstances which would ordinarily make it binding, if made by a sane person with one who is insane, and that contract has been adopted, and is sought to be enforced by the representatives of the latter, it is no defense to the sane party merely to show that the other party was *non compos mentis* at the time the contract was made. *Allen v. Berryhill*, 27 Iowa, 534; 1 Story on Cont., § 75. See *Behrens v. McKenzie*, 28 Iowa, 333. So, intoxication only renders a contract voidable, and the intoxicated party may, upon recovering his understanding, adopt it. *Taylor v. Patrick*, 1 Bibb (Ky.), 168; *Arnold v. Hickman*, 6 Munt. (Va.) 15; *Drummond v. Hopper*, 4 Harr. (Del.) 327; *Burroughs v. Rickman*, 1 Green (N. J.), 233. In some cases the incapacity to contract arises from considerations of public policy. On this ground infants are disabled from contracting, except under certain limitations (see *Heath v. West*, 6 Fost. [N. H.] 193; *Carr v. Clough*, id. 280; *Knox v. Flack*, 10 Harris [Penn.], 337; *Badger v. Phinney*, 15 Mass. 359); and, at common law, a married woman cannot, during her coverture, make an obligatory contract. See *Davis v. Burnham*, 27 Vt. 562; *Crumbley v. Searcey*, 46 Ala. 323.

There is no contract without assent of parties thereto. If any essential matter is left open for further consideration the contract is not complete. See, generally, *Tucker v. Woods*, 12 Johns. 190; *Lyman v. Robinson*, 14 Allen (Mass.), 234; *White v. Corties*, 46 N. Y. (1 Sick.) 467; *Brown v. New York Central R. R.*, 44 N. Y. (5 Hand) 79; *Hartford & N. H. R. R. v. Jackson*, 24 Conn. 514. There must be a proposition by the one party accepted by the other. Id.; *Rowell v. Montville*, 4 Greenl. (Me.) 270; *Eskridge v. Glover*, 5 Stew. & Port. (Ala.) 264. See *Bornstein v. Lans*, 104 Mass. 216. As to offer and acceptance by mail, see *Cornwells v. Kregel*, 41 Ill. 394; *Clark v. Dales*, 20 Barb. 42; *Trevor v. Wood*, 36 N. Y. (9 Tiff.) 307; *Abbot v. Shepard*, 48 N. H. 14; *Falls v. Gaither*, 9 Port. (Ala.) 605. Not only must there be mutual assent, but it must be given freely, in order to render the contract valid. Compulsion, or duress *per minas*, will avoid any promise. *Tilley v. Damon*, 11 Cush. (Mass.) 247; *Soule v. Bonney*, 37 Me. 128. And in the United States it has been held, that duress of goods will, under some circumstances, render a contract voidable. *Collins v. Westbury*, 2 Bay. (S. C.) 211; *Susportas v. Jennings*, 1 id. 470; *Spaids v. Barrett*, 57 Ill. 289; *James v. Roberts*, 18 Ohio, 548; *Foshay v. Ferguson*, 5 Hill, 158. But imprisonment, under regular and formal legal process, does not constitute such duress as will invalidate the contract of the prisoner: *Soule v. Bonney*, 37 Me. 128; *Watkins v. Baird*, 6 Mass. 511; *Taylor v. Cottrell*, 16 Ill. 93; *Stouffer v. Latslaw*, 2 Watts (Penn.), 167. And one who has entered into a contract under duress may either affirm or avoid such contract after the duress has ceased. *Lewis v. Banister*, 16 Gray (Mass.), 500.

A contract made under an injurious mistake, or ignorance of a material fact, is also voidable. *Watts v. Cummins*, 59 Penn. St. 84; *Haven v. Foster*, 9 Pick. (Mass.) 129. But ignorance of law will not avoid a contract. *Hunt v. Rousmaniere*, 1 Pet. (U. S.) 15; *Bank of U. S. v. Daniel*, 12 id. 82. See *Lanning v. Carpenter*, 48 N. Y. (3 Sick.) 408; *Pitcher v. Honnesey*, id. 415.

Parties are perfectly free to contract in any way that the law does not forbid; this right to contract being essential for the trading classes, and indeed for every * member of the community. A contract may be either [*155] express or implied.

An express contract is where the terms of the agreement are, at the time of making it, openly uttered and avowed, as to deliver an ox, or ten loads of timber, or to pay a stated price for certain goods.

Express.

An implied contract is one which reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. (503) Thus, if I employ a person to transact any business

Implied.

for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case upon such implied promise, undertaking, or *assumpsit*; wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is in technical language, called an *assumpsit* on a *quantum meruit*. So, if I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value, and there is an implied *assumpsit* on a *quantum valebat*, which is very similar to the former. The law concludes, that both parties did intentionally agree, that the real value of the goods should be paid; and an action may be brought accordingly, if the vendee refuses to pay such value.

Another species of implied *assumpsit* is when one has received money belonging to another, without any valuable consideration given on the receiver's part: for the law construes this to be money received for the use of the owner only; and implies that the person so receiving promised and undertook to account for it to the true proprietor. And if he unjustly detains it, an action

(503) All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed we call the contract an express one. When it is not expressed it may be inferred, implied, or presumed, from circumstances, as really existing, and then the contract, thus ascertained, is called an implied one. *Hertzog v. Hertzog*, 29 Penn. St. 465. And see *United States v. Russell*, 13 Wall. (U. S.) 623; *Ogden v. Saunders*, 13 Wheat. (U. S.) 341; *Kelby v. Andrew*, 43 Miss. 342.

Where services are rendered between members of the same family the law does not so readily imply a contract as in cases where no such relationship exists. See *Smith v. Milligan*, 43 Penn. St. 107; *Butler v. Slane*, 50 id. 456; *Perry v. Perry*, 2 Dav. (Ky.) 312. Thus, it raises no implied promise in a parent to pay a child who remains in the family after he is of age. Id. See *Ridgway v. English*, 2 Zabr. (N. J.) 409; *Robinson v. Cushman*, 2 Denio, 149, 152; *Williams v. Hutchinson*, 3 N. Y. (3 Comst.) 312. An agreement, by the father, that his son should be paid out of his estate after his death, is, however, valid. *Updike v. Ten Broeck*, 3 Vroom (N. J.), 105. And the rule extends to adopted children. *Lunay v. Vantine*, 40 Vt. 501. See, also, *Robinson v. Raynor*, 28 N. Y. (1 Tiff.) 494; *Davison v. Davison*, 2 Beas. (N. J.) 246; *Kennard v. Whitson*, 1 Houst. (Del.) 38.

The law will not imply a promise where there is an express promise (*Nelson v. Von Bonhorst*, 29 Penn. St. 352; *Weston v. Davis*, 24 Me. 374); nor against the express declaration of the party made at the time of the supposed implied undertaking. *Whiting v. Sullivan*, 7 Mass. 107. See *Patten v. Hood*, 40 Me. 457.

[* 156] lies *against him for the breach of such implied promise and undertaking; and he will be made to recompense the owner in damages, for what he has detained in violation of his promise. This is a very extensive and beneficial remedy, applicable in many cases where the defendant has received money which *ex æquo et bono* he ought to refund. It lies for money paid by mistake or on a consideration which has failed, or through imposition, extortion or oppression, or where any undue advantage has been taken of the plaintiff's situation.

So where a person has laid out and expended his own money for the use of another, at his request, the law implies a promise of repayment, and an action will lie on this *assumpsit*; and upon a stated account between two merchants, or other persons, the law implies that he against whom the balance appears has engaged to pay it to the other; though there be not any actual promise.

A contract then may be set forth in words spoken or written, or may be raised and inferred from what has been said, or from surrounding circumstances and the conduct of the parties. Of either sort of contract, express or implied, a court of law will take cognisance, and will award pecuniary compensation for its breach. A court, however, must often be guided by considerations in regard to the one of them, different from those which guide or influence it in regard to the other. An express contract, when conceived in terms definite and unambiguous, indicates the reciprocal rights and duties of the parties to it. And here the function of the court is auxiliary to carrying into effect, so far as its machinery may allow, their will. It sometimes happens, however, that the wording of an express contract is obscure and doubtful, and then the duty of interpreting it devolves upon the court, and certain rules of construction have to be called in aid for determining its significance. (504) The leading canons of interpretation may be thus expounded. The construction must be ascertained on a view and careful examination [* 157] of the entire instrument, one part of which should be made, if possible, to explain another, so that every word used in it may take effect. The duty of the court being to ascertain not what the contracting parties may be supposed to have intended, but the meaning of the words which they have used; and these words should be construed according to their ordinary and grammatical sense, unless some obvious absurdity, or some repugnance, or inconsistency with the intention appearing on the whole

(504) The general rules of interpretation and construction are the same, both in law and in equity; and are equally applicable to specialties and simple contracts. 1 Story on Cont., § 773; *Kane v. Hood*, 18 Pick. (Mass.) 281. Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances; and may avail themselves of the same light which the parties enjoyed when the contract was executed. They are, accordingly, entitled to place themselves in the same situation as the parties who made the contract, in order that they may view the circumstances as those parties then viewed them, and so judge of the meaning of the words and of the correct application of language to the things described. *Nash v. Towne*, 5 Wall. (U.S.) 689. See *Goosey v. Goosey*, 48 Miss. 210.

Where a contract is oral the question what the contract is, must, if controverted, be tried by the jury as a question of fact (*Globe Works v. Wright*, 106 Mass. 216; *Guptill v. Damon*, 42 Me. 271. See *Taliaferro v. Cundiff*, 33 Tex. 415); but where the terms of a contract are undisputed, its construction and effect, where the contract is oral as well as where it is written, are to be determined by the court. *Nash v. Drisco*, 51 Me. 417; *Randall v. Thornton*, 42 id. 226; *Railroad v. Fell*, 52 N. H. 379; *Globe Works v. Wright*, 106 Mass. 216.

instrument, would follow from such construction—the words used will then, if possible, be modified to avoid the consequences hinted at, but no further (a). Evidence of usage and custom is, moreover, admissible, to explain a mercantile contract, provided such evidence does not go to contravene or vary it.

A contract may either be executed, as if A agrees to change horses with B, and they do it immediately; in which case the possession and the right are transferred together: or it may be executory, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract executed conveys a chose in possession; a contract executory conveys only a chose in action.

2ndly. Having thus shown the general nature of a contract, we are, secondly, to proceed to the consideration upon which it is founded; or the reason which moves the contracting party to enter into the contract. A contract is an agreement, "upon consideration." The benefit which accrues to the promisor, or the inconvenience or detriment suffered by the promisee, is called the consideration for the promise: and it must be a thing lawful in itself, or else the contract is voidable. A good consideration merely, * which, as we have before seen (b), is that of blood or [* 158] natural affection between near relations, will not support an *assumpsit*. But a contract may rest upon any valuable consideration, as money, or work done, for the person contracted with has then given an equivalent in recompense, for the undertaking by the other party.

Valuable considerations are divided by the civilians (c) into four species: 1. *Do, ut des*: as when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment; and all sales of goods, in which either there is an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio, ut facias*: as, when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together; or to do any other positive acts on both sides. Or, it may be to forbear on one side in consideration of something done on the other; as, that in consideration A, the tenant, will repair his house, B, the landlord, will not sue him for waste. Or, it may be for mutual forbearance on both sides; as, that in consideration that A will not trade to Lisbon, B will not trade to Marseilles; so as to avoid interfering with each other. 3. The third species of consideration is *facio, ut des*: when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value to it. And when a servant hires himself to his master for certain wages or an agreed sum of money: here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform the service for what it shall be reasonably worth. 4. The fourth species is, *do, ut facias*: which is the direct counterpart of the preceding. As when I agree with a servant to give him such wages, upon his

(a) See the remarks of Lord Wensleydale, *Slingby v. Grainger*, 7 H. L. Ca. 284; *Abbott v. Middleton*, *Id.* 114; *Grey v. Pearson*, 6 H. L. Ca. 106, which, though made with refer-

ence to testamentary instruments, are applicable to agreements.

(b) *Ante*, Vol. II.

(c) Dig. 19. 5. 5.

[* 159] * performing such work: which, we see, is nothing else but the last species inverted; for *servus facit, ut herus det*, and *herus dat, ut servus faciat*.

The nature of a consideration will be abundantly exemplified in the ensuing pages, and we shall here merely add that a consideration of some sort or other is so necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay something on one side, without any compensation on the other, will not at law support an action: and a man cannot be compelled to perform it. As if one man promises to give another 100*l.*, here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform his promise, in honour of conscience, which the municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of that which he had no visible inducement to engage for: for our law has adopted the maxim of the civil law that *ex nudo pacto non oritur actio*. (505)

3rdly. We are next to consider the thing agreed to be done or not to be done. A contract is an agreement, upon consideration, "to do or not to do a particular thing."

We must here consequently enquire concerning specific kinds of contracts, and shall divide them into three classes. I. Contracts which are required to be in writing by the statute law. II. Contracts which, by mercantile custom, are in writing. III. Other contracts.

I. Within the first of the above three classes (regard being had to the scope of our present Volume (*d*)), may be included the contract of sale, guaranties, agreements not to be performed within a year, and some other contracts which are of less frequent occurrence and less importance (*e*).

[* 160] * 1. Sale is a transfer of property from one man to another, in consideration of some price or recompense in value: for there is no sale

(*d*) Contracts relating to real property have been discussed in Vol. ii.

(*e*) Generally, as regards the stamps on written contracts, see Tilsley's Stamp Acts.

(505) If a contract is deliberately made without fraud, and with a full knowledge of all the circumstances, the least consideration will be sufficient. *Train v. Gold*, 5 Pick. (Mass.) 384. But it must appear not to be utterly valueless. And a contract, founded upon a consideration mistakenly supposed to be of value, but which turns out afterward to be utterly worthless, cannot be enforced. 1 Story on Cont., § 544; *Maull v. Vaughan*, 45 Ala. 184; *Cabot v. Haskins*, 3 Pick. (Mass.) 83.

A waiver of a legal right, at the request of another, is a sufficient consideration. *Sykes v. Lafferry*, 27 Ark. 407. So a promise by a wrong-doer to pay damages for the injury done is held a sufficient consideration for a contract. *Beadle v. Whitlock*, 64 Barb. 287.

The promise of one party is sufficient consideration for that of the other. *Babcock v. Wilson*, 17 Me. 372; *Whitehead v. Potter*, 4 Ired. (N. C.) 257; *Quarles v. George*, 23 Pick. (Mass.) 401. And where several promise to contribute to a common object, which they wish to accomplish, the promise of each has been held a good consideration for the promise of the others. *Hanson v. Stetson*, 5 Pick. (Mass.) 506; *Society in Troy v. Perry*, 5 N. H. 164; *State Treas. v. Cross*, 9 Vt. 298; *Stewart v. Hamilton College*, 2 Denio, 408; *Ladies' Collegiate Institute v. French*, 16 Gray (Mass.), 196. Mutual promises of marriage are binding: and the promise of an infant to marry is a sufficient consideration for a corresponding promise by an adult. *Wightman v. Coates*, 15 Mass. 1; *Willard v. Stone*, 7 Cow. 22.

1. Contract of sale.

without a recompense; there must be *quid pro quo* (*f*). (506) A commutation of goods for goods, is properly an exchange; but a transferring of goods for money, is called a sale: which is a method of exchange introduced for the convenience of mankind, money having been established as a universal medium, which may be exchanged for all sorts of other property; whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome. All civilized nations adopted therefore very early the use of money; for we find Abraham giving "four hundred shekels of silver, current money with the merchant," for the field of Machpelah (*g*): though the practice of exchange is still found to subsist among savage tribes. We shall not further advert to it, as such a transaction rarely comes under judicial notice (*h*).

A sale differs from a gift, inasmuch as there is a consideration for the former, and none for the latter. And hence the gift of a chattel, if valid, must either be authenticated by deed, or be accompanied with delivery of possession (*i*); as if A gives to B 100*l.*, or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any consideration or recompense: unless it be prejudicial to creditors; or the donor were under some legal incapacity, as infancy or coverture; or if he were drawn in, circumvented, or imposed upon, by false pretences, ebriety, or surprise.

If A and B mutually treat for the sale and purchase of goods which are in *esse*, (507) then, generally speaking, their contract will be complete when its terms have been *adjusted and made sufficiently definite, and have [*161] been assented to on both sides. If the vendor says, the price of certain goods is four pounds, and the vendee says, he will give four pounds, the bargain is struck; and neither of the parties is at liberty to be off, the obligation imposed upon the vendor being to deliver the goods upon payment of the price, and that imposed on the purchaser being to pay the price agreed upon, and receive the goods (*j*); and in the case put, the property in the goods, if

(*f*) Noy's Max. c. 42.

(*g*) Gen. c. 23, v. 16.

(*h*) See *Parker v. Rawlings*, 4 Bing. 280.

(*i*) *Irons v. Smallpiece*, 2 B. & Ald. 551;

Shower v. Pilck, 4 Exch. 478.

(*j*) Blackburn, Contract of Sale, 199.

(506) As it regards the fixing of a price, a reference to a certain sum given by another person, or to the arbitration of a third person, is sufficient. 2 Story on Cont., § 994; *Hutton v. Pearce*, 26 Ark. 382; *Brown v. Bellows*, 4 Pick. (Mass.) 179, 189; *Fuller v. Bean*, 34 N. H. 301; *McCandlish v. Newman*, 22 Penn. St. 460. Mere inadequacy of price is not a sufficient ground for setting aside a sale, unless the inadequacy be so gross and palpable as, of itself, to afford evidence of actual fraud. *Osgood v. Franklin*, 2 Johns. Ch. 1; S. C. affirmed, 14 Johns. 527. In such case a court of equity will grant relief. *Id.* See, as to distinction between a sale and exchange, *Mitchell v. Gile*, 12 N. H. 390; *Vail v. Strong*, 10 Vt. 457. For cases illustrating the difference between a sale and a bailment, see *Fuller v. Buswell*, 34 Vt. 107; *Hunt v. Wyman*, 100 Mass. 198. The same rules of law apply to a sale and to an exchange. *Com. v. Clark*, 14 Gray (Mass.), 371, 372. As to a gift, see *Hanson v. Millett*, 55 Me. 184; *Grover v. Grover*, 24 Pick. (Mass.) 261; *Attorney-General v. Merrimack Manufg Co.*, 14 Gray (Mass.), 603.

(507) See *Allen v. Hammond*, 11 Pet. (U.S.) 68; *Rice v. Dwight Manuf. Co.*, 2 Cush. (Mass.) 80, 86; *Thompson v. Gould*, 20 Pick. (Mass.) 139; *Gardner v. Lane*, 9 Allen (Mass.), 499; *Huthmacher v. Harris*, 38 Penn. St. 491; *Curtis v. Curtis*, 40 Me. 24. Any mistake as to the identity of the thing to be sold will vitiate the sale. See *Kyle v. Kavanagh*, 108 Mass. 356.

defined and appropriated (*k*), passes by the bargain and sale to the vendee. According to the law of England, "by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties" (*l*). (508)

Where, indeed, parties have, by their words or conduct, sufficiently indicated their intention as to the mode of carrying out the stipulations of their contract, a court of law, if called on, will endeavour to give operation and effect to such intention. If there be a sale of goods which are to be sent by a carrier to the purchaser, and the goods perish or sustain damage whilst *in transitu*, the ordinary rule of our law would, in the absence of special circumstances, apply. Delivery to the carrier is delivery to the consignee, who will therefore have to bear the loss. But if the parties intend that the vendor shall not merely deliver the goods to the carrier, but undertake that they shall actually be delivered at their destination, and express such intention, effect will be given to this arrangement; and, in such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser, in consequence of the breach of his (the vendor's) *contract to deliver at the [* 162] place of destination. Or, again, the parties may intend that the vendor shall deliver the goods, which are the subject-matter of their contract, to the carrier, and that, when he has done so, he shall have fulfilled his undertaking, so that he shall not be liable in damages for a breach of contract if the goods do not reach their destination; and yet the contracting parties may intend that the whole or part of the price shall not be payable unless the goods arrive. The parties may bargain and agree that the property in the goods shall vest in the purchaser as soon as the goods are shipped, and yet that the price in whole or in part shall be payable only on the contingency of the goods arriving; and to such an arrangement, if the intention of the parties be expressed, the court will give effect; if the intention be not expressed in terms, the court will endeavour to ascertain it from the various stipulations in the contract (*m*). If, again, there be a usage or custom of trade shown to exist affecting the subject-matter of the contract, such usage or custom, if not inconsistent with, will be imported into the contract, and so will become a term or item of agreement between the contracting parties, who will be presumed to have meant to incorporate the mercantile usage or local custom with their contract (*n*).

The transfer of property may take place either upon or after delivery (*o*).

(*k*) See *White v. Wilks*, 5 Taunt. 177; (*n*) *Syers v. Jonas*, 2 Exch. 111; *Humfrey Rhode v. Thwaites*, 6 B. & C. 888; *Young v. v. Dale*, E. B. & E. 1004.

Mattheus, L. R. 2 C. P. 127.

(*l*) *Gilmour v. Supple*, 11 Moo. P. C. C. 566.

(*m*) See *Calcutta and Burmah Steam Nav. Co. v. De Mattos*, 32 L. J., Q. B. 322; *Dunlop v. Lambert*, 6 Cl. & F. 600, 621.

(*o*) As to what may suffice to constitute evidence of delivery, see *per Erle, C. J., Martin v. Reid*, 11 C. B., N. S. 735.

(508) An unconditional sale of specific chattels passes the title at once, and the buyer takes the risk of loss, and has the right to immediate possession. *Merchants' National Bank v. Bangs*, 102 Mass. 291; *Morse v. Sherman*, 106 id. 433. See *Chase v. Willard*, 57 Me. 157; *Bailey v. Smith*, 43 N. H. 143; *Potter v. Washburn*, 13 Vt. 558; *Weld v. Cams*, 98 Mass. 152; *Waldron v. Chase*, 37 Me. 414; *Hooban v. Bidwell*, 16 Ohio, 509; *Willis v. Willis*, 6 Dana (Ky.), 48.

For instance, where anything remains to be done by the seller of the goods which are the subject-matter of the contract, for the purpose of ascertaining their price, as by weighing, measuring, or testing them, the price having been made dependent on the quantity or quality of the goods, the performance of such thing is a condition precedent to the transfer of the property in the goods, even though they be ascertained and are in the *state in [*163] which they ought to be accepted. But this general rule may be modified by the expressed intention of the parties (*p*). (509)

Where a contract is made for the purchase and sale of goods not ascertained, the property therein cannot of course pass immediately to the vendor, but it is quite competent to the vendor and vendee to make whatsoever bargain they please, so as to regulate the vesting of the property in the goods when they have become ascertained and specific, and the courts will endeavour to search out and give effect to such their intention. If goods are ordered from abroad under a contract, showing the intention of the parties to be that the goods shall be shipped by the person who is to supply them, on the terms that when shipped they shall be the consignee's property, and at his risk, so that the vendor shall be paid them whether delivered at the port of destination or not, this intention is effectual. Such is a very common state of things, and the obligations thence resulting are of this kind:—The vendor's duty is in such case at an end, when he has delivered the goods to the carrier, and if the goods perish in the carrier's hands, the maxim *res perit domino* applies; the vendor is discharged, and the purchaser is bound to pay to him the price of the goods or merchandize (*q*).

As closely connected with this part of our subject, a peculiar doctrine of the law demands attention. Where an unpaid vendor of goods has put them into the hands of a carrier in order to their being by him conveyed and delivered to the vendee; then, if the vendee before actual delivery to him becomes bankrupt or insolvent, the vendor has a right, if he can, to resume possession of the goods, by stopping them *in transitu* (*r*), but his right to do so will *be defeated if the consignee of the goods [*164] assign over the bill of lading to one who *bond fide* purchases them.

The assignment of a bill of lading is in practice frequent, and so the vendor's

(*p*) *Turley v. Bates*, 2 H. & C. 200; *Gilmour v. Supple*, 11 Moo. P. C. C. 567.

(*q*) *Dunlop v. Lambert*, 6 Cl. & F. 600; *Wood v. Bell*, 5 E. & B. 791—2, 6 E. & B. 855.

(*r*) In regard to the parentage of this right, whether it be the offspring of a court of equity or of law, and likewise in regard to its true nature, obscurity prevails. Sometimes this right of the vendor to stop *in transitu* has been viewed as an equitable lien upon the goods; sometimes regarded as a privilege resulting from his latent *jus proprietatis*; or as a power impliedly reserved to him to rescind the contract of sale under certain circumstances; or as an arbitrary

doctrine adopted for the benefit of trade. According to the opinion of Lord Abinger, in *Gibson v. Carruthers*, 8 M. & W. 339, the right of stoppage *in transitu* may be presumed to be a part of the law of merchants, which prevails generally on the continent, the proof of which, from time to time, by competent evidence, combined with its manifest justice and utility, at length introduced it into the common law of England, of which the law merchant, properly understood, has always been reckoned to form a part. See further as to this, Blackburn, *Contract of Sale*, Pt. iii. chap. 1.

(509) On this subject see the following instructive American cases: *Sawyer v. Nichols*, 40 Me. 212; *Hotchkiss v. Hunt*, 49 id. 213; *Walden v. Murdock*, 23 Cal. 540; *Prescott v. Locke*, 51 N. H. 94; *Walrath v. Ingles*, 64 Barb. 265; *Stone v. Peacock*, 35 Me. 388; *Sumner v. Hamlet*, 19 Pick. (Mass.) 76; *Frost v. Woodruff*, 54 Ill. 165; *Ockington v. Richey*, 41 N. H. 275, 281; *Ward v. Shaw*, 7 Wend. 404; *Foster v. Ropes*, 111 Mass. 10.

right to stop *in transitu* is often set at naught. Thus, a merchant resident in this country, has merchandize consigned to him from abroad; he receives advice that there is a large quantity of the same article ready for shipment to our market; he knows that when these projected consignments arrive the home market will be glutted, and the goods in question depreciated in value. He wishes, therefore, to sell his own cargo immediately, whilst it is at sea, and before it comes to hand, and the profit thus derivable would be fairly gained; accordingly he desires to negotiate the bill of lading, and he would of course be precluded from doing so unless he could thereby legally defeat the right of his consignor to stop *in transitu*. A quick circulation is the life and soul of trade, and if the merchant cannot sell with safety to the buyer, that quickness of circulation must necessarily be retarded (*s*). The right of stoppage *in transitu* exists then, in the event mentioned, where goods have been sold and constructively delivered; delivery to the carrier, whether by land or water, being in [*165] law a delivery to the *vendee (*t*), and our law regarding the contract of sale as ambulatory and permitting the unpaid vendor at any time before the arrival of the goods at their place of destination, at any time, indeed, before they have got into the purchaser's hands, or the bill of lading has been assigned, to resume possession of the goods, and thus to put himself in the same position as if he had not parted with them. But the right of stoppage *in transitu* cannot be exercised when the transit is terminated (*u*). (510)

(*s*) *Per* Buller, J., *Lickbarrow v. Mason*, 2 bill of lading have been amplified by stat. 18 T. R. 63; 1 H. Bla. 857. & 19 Vict. c. 111.

The rights of the *bond fide* assignee of a (*t*) *Ante*, p. 161.

(*u*) *Heinekey v. Earle*, 8 E. & B. 410.

(510) The right of stoppage *in transitu* is nothing more than the extension of the right of lien, which by the common law the vendor has upon goods for the price, originally allowed in equity, and subsequently adopted as a rule of law. *Rowley v. Bigelow*, 12 Pick. (Mass.) 313; *Grout v. Hill*, 4 Gray (Mass.), 361, 366. See *Newhall v. Vargas*, 13 Me. 93; S. C., 15 id. 314. The exercise of the right of stoppage does not amount to a rescission of the contract (see *id.*; *Stanton v. Eager*, 16 Pick. [Mass.] 474; *Chandler v. Fulton*, 10 Tex. 2; *Rogers v. Thomas*, 20 Conn. 53); and the vendee, at any time after stoppage, may recover the goods upon payment or tender of the price. See *id.*; *Rowley v. Bigelow*, 12 Pick. (Mass.) 313; *Atkins v. Cobby*, 20 N. H. 154; *Benedict v. Schaettle*, 12 Ohio St. 515.

The object in allowing the privilege of stoppage *in transitu* to the vendor being his protection against the insolvency of the vendee, such privilege, unless waived, properly extends to cases of insolvency, whether existing at the time of sale and unknown to the vendor, or occurring at any time before the actual delivery of the goods. *Benedict v. Schaettle*, 12 Ohio St. 515. See also *Blum v. Marks*, 21 La. Ann. 268; *O'Brien v. Norris*, 16 Md. 122; *Reynolds v. The Railroad*, 43 N. H. 580. But see *contra*, *Rogers v. Thomas*, 20 Conn. 53. Insolvency may be established by proof of inability to pay; and proof of some overt act of insolvency, such as a stoppage of payment, is not requisite. *Secomb v. Nutt*, 14 B. Monr. (Ky.) 324; *Benedict v. Schaettle*, 12 Ohio St. 515. But see *contra*, *Rodgers v. Thomas*, *supra*. See, on this subject, *Chandler v. Fulton*, 10 Tex. 2; *Hays v. Monille*, 14 Penn. St. 51.

The right to stop *in transitu*, in the proper sense of the term, only exists as between vendor and vendee. See *The Merrimac*, 8 Cranch, 317, 358; *Newhall v. Vargas*, 13 Me. 93; S. C., 15 id. 314; *Ash v. Putnam*, 1 Hill. 302; *Naylor v. Dennis*, 8 Pick. (Mass.) 198. Whenever the *transitus* is terminated the right of stoppage is gone. But the *transitus* will endure as long as anything remains to be done by the carrier for the purposes of transporting the goods to the purchaser, or by the purchaser, to entitle him to receive them from the carrier; and although the delivery by which it is terminated need not be actual, it must be final, and not a mere pause in a journey which is not ended, and is subsequently to be resumed. See *Harris v. Pratt*, 17 N. Y. (3 Smith) 249; *Fraschieris v. Henriques*, 6 Abb. N. S. 251; *Cabene v. Campbell*, 30 Penn. St. 254; *Secomb v. Nutt*, 14 B. Monr. (Ky.) 324; *Frazer v.*

Such being the contract of sale and its effect in passing property at common law, certain statutory provisions concerning it must be noticed. Our customary law recognized no distinction between verbal contracts and written contracts not under seal (x). It discriminated merely between a deed and a parol contract. To the former sealing and delivery were essential; the latter had to be proved by the testimony of bystanders, by admissions express or implied, or in any way that was available. When, however, writing had become common, and trading operations had expanded, the legislature thought it expedient in some cases to draw a line between written and verbal contracts, and to require proof in writing of an alleged contract for breach of which the plaintiff sued. Such proof has been necessitated by various enactments, the most important of these being the Statute of Frauds.

The Statute of Frauds (y) was passed for "prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury;" and by its 17th section enacts, that ^{29 Car. 2, c. 3, s. 17.} "no contract for the sale of any goods, wares, or merchandises, for the price of 10*l.* sterling or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold, and actually receive the same, or give something * in earnest to bind the bargain, or in part of payment (z), or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." (511) Further, it having been

(x) *Rann v. Hughes*, 7 T. R. 350 (s).

(y) 29 Car. 2, c. 3.

(z) By our common law, if any part of the price of goods is paid down, if it be but a penny, or any portion of the goods delivered by way of earnest, (which the Roman law calls *arraha*, and interprets to be *emptio venditionis contractus argumentum* (Inst. 3, tit. 24)), the property of the goods is absolutely bound, so that the vendee may recover the

goods by action, and the vendor may recover the price of them (Noy's Max. c. 42).

Anciently, among the northern nations, shaking of hands was held necessary to bind a bargain. A sale thus made was called hand-sale, "*venditio per mutuum manuum complexionem*" (Stiernhook de Jure Goth. l. 2, c. 5), till in process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof.

Hilliard, 2 Strobb. (S. C.) 309; *Stevens v. Wheeler*, 27 Barb. 658; *Grout v. Hill*, 4 Gray (Mass.), 361. While the goods remain unpaid for, and the *transitus* continues, the right of the vendor to stop them, upon the occurrence of insolvency in the vendee, may be defeated by a *bond fide* sale, for a valuable consideration, accompanied by a transfer of the bill of lading. All these requisites must, however, concur. *Stanton v. Eager*, 16 Pick. (Mass.) 473; *Kitchen v. Speur*, 30 Vt. 515; *O'Brien v. Norris*, 16 Md. 122. An attachment of goods on board a vessel, as the property of the consignee, does not defeat the right of the consignor to stop them *in transitu*. *Hause v. Judson*, 4 Dana (Ky.), 12; *Wood v. Yeatman*, 15 B. Monr. (Ky.) 270; *Naylor v. Dennie*, 8 Pick. (Mass.) 198; *Clark v. Lynch*, 4 Daly, 83.

Although the vendor may have received part payment for the goods in cash, he may still have recourse to a stoppage *in transitu* for the remainder of the price. *Newhall v. Vargas*, 13 Me. 93; S. C., 15 id. 314. In order to destroy the right as between vendor and vendee, there must be a full payment or final delivery of the whole of the goods. If part only be delivered the right will survive as to the rest. *White v. Welsh*, 38 Penn. St. 396; *Cabern v. Campbell*, 30 id. 264; *Buckley v. Furniss*, 15 Wend. 137; S. C. again, 17 id. 504.

The right of stoppage *in transitu* is held applicable to bills of exchange. *Muller v. Pondir*, 6 Lans. 472.

(511) The provisions of the English Statute of Frauds have been generally adopted throughout the United States. The amount necessary to bring a sale within the provisions of the statute varies in the different States. Thus, in New York it is fixed at \$50, in Vermont at \$40, in New Hampshire at \$33.33, in Maine at \$30, and in Massachusetts at \$50.

thought doubtful whether this section applied at all to any executory contract, the subject-matter of which did not exist at the time of contracting, or was to be delivered afterwards (a), the 7th section of lord Tenterden's Geo. 4, c. 4, s. 7.

Act (b) extends its operation to all contracts for the sale of goods of the value of 10*l.* and upwards, notwithstanding such goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, or be fit or ready for delivery, or although some act may be requisite for the making or completing thereof or rendering the same fit for delivery. The above clause of lord Tenterden's Act and the 17th section of the Statute of Frauds are to be read as though incorporated together (c), so that if an order be given for goods made and for others to be made, this will form one entire contract, to which the alternative clauses of the 17th section will have to be applied—for instance, acceptance of the former goods will take the case out of the statutes so as to render a written contract unnecessary as regards the latter also (d).

[* 167] * The general effect of the 17th section of the Statute of Frauds is clear; it nullifies a contract not authenticated in conformity with its requirements (e). Serious difficulties have, however, arisen in construing it, and embarrassment has been felt in regard to the sufficiency of the memorandum (f) and of the signature (g) which will satisfy it; perhaps from among

(a) *Per* Littledale, J., *Smith v. Surman*, 9 B. & C. 574.

(b) 9 Geo. 4, c. 14.

(c) *Per* Lord Abinger, C. B., *Scott v. Eastern Counties R. Co.*, 12 M. & W. 38.

(d) As to cases within the above statutes, see *Clay v. Yates*, 1 H. & N. 78, 78.

(e) *Noble v. Ward*, L. R. 2 Ex. 135.

(f) *Newell v. Radford*, L. R. 8 C. P. 52;

Vanderbergh v. Spooner, L. R. 1 Ex. 316;

Gibson v. Holland, L. R. 1 C. P. 1.

(g) *Caton v. Caton*, L. R. 2 App. Cas. 127.

The form of the memorandum of the bargain required by the statute is not material; but it must state the contract with reasonable certainty, so that the substance of it can be understood from the writing itself, without having recourse to parol proof. *Bailey v. Ogden*, 8 Johns. 399; *Salmon Falls Manuf. Co. v. Goddard*, 14 How. (U. S.) 446; *Hurley v. Brown*, 98 Mass. 546. It is sufficient if it be in pencil. *McDowell v. Chambers*, 1 Strobb. (S. C.) 347; *Clason v. Bailey*, 14 Johns. 584. So, it is sufficient if it be signed by the party to be charged without its being signed by the other party. See *Dressel v. Jordan*, 104 Mass. 412; *Shirley v. Shirley*, 7 Blackf. (Ind.) 452; *Idle v. Stanton*, 15 Vt. 687; *De Cordova v. Smith*, 9 Tex. 129. In New York the name of the party must be signed below or at the end of the memorandum. *Vielie v. Osgood*, 8 Barb. 180; *Davis v. Shields*, 26 Wend. 341. Where the contract or memorandum of it is to be proved from several papers, there must be clear reference from one to the other. *Kurts v. Cummings*, 24 Penn. St. 25; *O'Donnell v. Leman*, 43 Me. 158; *Fowler v. Rendican*, 52 Ill. 405; *Moale v. Buchanan*, 11 Gill. & J. (Md.) 314.

It has been held by the supreme court of Massachusetts that a contract for the sale of shares in a manufacturing corporation is a contract for the sale of "goods, wares or merchandise," within the statute. *Tisdale v. Harris*, 20 Pick. 18; and see, to the same effect, *North v. Forest*, 15 Conn. 404; *Calvin v. Williams*, 8 Harr. & J. (Md.) 38. But see, *contra*, *Hudson v. Weir*, 29 Ala. 294; *Whittemore v. Gibbs*, 24 N. H. 484. So, a contract for the sale of promissory notes is held to be within the statute. *Baldwin v. Williams*, 8 Metc. (Mass.) 367. And so of a sale of bank bills. *Gooch v. Holmes*, 41 Me. 538.

As to the effect of an acceptance to satisfy the statute of frauds, see *Snow v. Warner*, 10 Metc. (Mass.) 132; *Maxwell v. Brown*, 39 Me. 98; *Outwater v. Dodge*, 6 Wend. 400. No act of the seller alone is sufficient to constitute an acceptance an actual receipt. *Shepherd v. Pressey*, 32 N. H. 49.

See, generally, as to the construction of the seventeenth section, the following American cases: *Hight v. Ripley*, 19 Me. 137; *Waterman v. Meigs*, 4 Cush. (Mass.) 497; *Bird v. Mühlenbrink*, 1 Rich. (S. C.) 199; *Mizer v. Howarth*, 21 Pick. (Mass.) 205; *Crookshank v. Burrell*, 18 Johns. 58; *Webster v. Zielly*, 52 Barb. 482; *Cooke v. Millard*, 5 Lans. 243.

such minor difficulties, the most noteworthy points decided are that a proposal in writing signed by the party to be charged and accepted verbally by the party to whom it is made will suffice (*h*), and that where a bought and a sold note, delivered respectively to the buyer and seller of goods by the broker who negotiates their sale, are relied upon as evidencing the contract, a material variance between such notes will preclude them from so doing (*i*). Where an offer to sell goods is made, the bargain is complete when a letter accepting such offer without qualification is put into the post (*j*).

The principal difficulty, however, experienced in construing the 17th section of the Statute of Frauds has arisen on that clause of it which provides as a substitute for a written memorandum of the sale of goods an "acceptance and actual receipt" thereof. It will be conceded that the word "accept" is stronger than the words "actually receive," which must be taken to signify a receipt *animo accipiendi*, and imply a delivery of the possession of the goods—actual as by their bodily transfer, or constructive as by handing over the key of the warehouse in which they are stored to the intended purchaser. * And in most cases the question whether or not the 17th section of the Statute of Frauds has been complied with will be one [* 168] of fact, and it will be for the jury to say what was the character of the transaction, whether or no the circumstances deposed to show that there was an acceptance and actual receipt of the goods in question (*k*); the larger the bulk of the goods as to which a question under the statute arises, the more impracticable would be a manual receipt of them.

Again, if goods sent on approval are retained by the consignee for an unreasonable time, or if acts of ownership are exercised by him over the goods, an acceptance may be inferred or presumed as against the alleged vendee when sued for the value of the goods. If the purchaser of goods by sample re-sells them before objecting to the quality of the goods, he will afterwards be precluded from saying that he has not accepted them within the statute, for he has exercised an indubitable act of ownership over the goods by re-selling them (*l*). And there may be an acceptance and receipt such as to satisfy the statute, and yet the buyer may refuse to carry out the contract on the ground that the goods were not according to it (*m*). Acts, indeed, done at different periods of time may be so connected together as to form one transaction, and therefore it would seem that an acceptance of goods within the statute may be prior to the actual delivery of them (*n*).

It was long since judiciously observed that the law is best applied when made subservient to the honesty of a case, and that our law merchant is ^{Effect of illegality or fraud.} a system of equity founded on the rules of equity and governed in all its parts by plain justice and good faith (*o*). Such a remark * forcibly applies to the contract of sale, which cannot be [* 169] allowed to stand if tainted by illegality or fraud.

Not only is a contract made in direct contravention of the statute law null

(*h*) *Reuss v. Picklesley*, L. R. 1 Ex. 342, which was decided under s. 4, as to which, *post*.

(*i*) *Sivewright v. Archibald*, 17 Q. B. 103.

(*j*) *Dunlop v. Higgins*, 1 H. L. Ca. 381; *Adams v. Lindsell*, 1 B. & Ald. 681.

(*k*) *Bushel v. Wheeler*, 15 Q. B. 442; *Kershaw v. Ogden*, 8 H. & C. 717.

(*l*) *Morton v. Tibbitt*, 15 Q. B. 428.

(*m*) *Smith v. Hudson*, 6 B. & S. 431, 450.

(*n*) Compare *Reuss v. Picklesley*, L. R. 1 Ex. 351—2; and cases there cited; *Morton v. Tibbitt*, *supra*; *Hunt v. Hecht*, 8 Exch. 814.

(*o*) *Master v. Miller*, 4 T. R. 385, 342.

and of no effect, but if two parties enter into an agreement whereby it is stipulated that one of them shall be enabled to commit an act
 illegality.

contrary to the provisions of a statute, though not expressly prohibited thereby except by the imposition of a penalty, the agreement is illegal and void (*p*). (512) This principle is sometimes applicable in an action for the price of goods. Statutes affecting the right to recover the price of goods by a vendor who has failed to comply with their requirements are of two kinds; the one class of statutes having for its object the raising and protection of the revenue, the other class being directed either to the protection of buyers and consumers, or to some object of public policy. In connection with the first-mentioned of these two classes the difficulty most likely to occur to the practitioner will be in determining whether the infliction of a penalty was meant by the legislature to imply a prohibition of the contract. In connection with the latter class, the inquiry will most likely be whether by reason of the vendor's non-compliance with certain statutory provisions, the law will decline to imply a promise by the purchaser to pay for the goods sold (*q*).

Again, from the current of reported cases we collect, that where any one has by fraud or wilful misrepresentation induced another to contract or to part with goods under the belief that such representation was true, a
 Fraud.

fraud has been committed which will not be tolerated by our law. And the fact that such fraud was practised may be alleged with a view to annulling the contract, and to compelling restitution of property transferred [** 170*] or money * paid in pursuance of it (*r*). Fraud destroys a contract *ab initio*, so that a fraudulent seller is precluded from setting up and insisting on the contract,—a fraudulent purchaser gets no title under it. Such, doubtless, is the general principle to be applied; a question of more nicety is this—What misstatement will—what will not—vitiate a contract? (*s*)

(*p*) *Ritchie v. Smith*, 6 C. B. 462. 477.

(*q*) *Cundell v. Dawson*, 4 C. B. 376.

(*r*) Fraud avoids a contract only where it is the ground of the contract, and where, unless it had been employed, the contract would never have been made; *per* Lord Wensleydale, *Smith v. Kay*, 7 H. L. Cas. 750; *Murray v. Mann*, 2 Exch. 538.

(*s*) As to the mode of resolving the question *supra*, see *Attwood v. Small*, 6 Cl. & F. 232, 413, 444, from which case, although decided with reference to realty, principles are deducible quite apposite to a sale of goods. As to contracts for the sale of land, or any interest therein, *ante*, vol. ii.

(512) It is well settled by American authorities that a contract founded directly on a consideration, rendered illegal by statute, whether the illegal act is in terms prohibited or is only punished with a penalty, is void. See *Coburn v. Odell*, 30 N. H. 540; *Stanley v. Nelson*, 28 Ala. 514; *Elkins v. Parkhurst*, 17 Vt. 105; *Downing v. Ringer*, 7 Mo. 585; *Siter v. Sheets*, 7 Ind. 132; *Ellsworth v. Mitchell*, 31 Me. 247; *Swords v. Owen*, 48 How. 176; *Smith v. City of Albany*, 7 Lans. 14. The validity of a contract is to be determined by the statute in force at the time it is made. If valid when made, a subsequent change or repeal of the law cannot impair its validity; and if it is void when made, no subsequent law can impart validity to it. *Mays v. Williams*, 27 Ala. 267; *Bennett v. Woolfolk*, 15 Ga. 213; *Bancho v. Mansel*, 47 Me. 58; *Miles v. Huber*, 3 McLean's C. C. 212. See *Aetna Ins. Co. v. Harvey*, 11 Wis. 394.

No action lies on any contract the consideration of which is either wicked in itself or prohibited by law. But if the illegal act is not the consideration of the contract, and is entirely disconnected from it, the contract is valid, though the occasion for making the contract arose out of the existence of the illegal act. *Toler v. Armstrong*, 4 Wash. C. C. 297; S. C., 11 Wheat. (U. S.) 258. See *Doty v. Wilson*, 14 Johns. 381; *Flanagan v. Garrison*, 28 Ga. 136.

It is clear that if the vendor of a chattel, during the negotiations preliminary to its sale, place fairly before or within reach of the intended purchaser facts and documents whence may be drawn right inferences as to its value, and if the purchaser do not choose to avail himself of the means of knowledge thus afforded, or if he fail in deducing true inferences from them, he will have but himself to blame should the purchase prove disadvantageous, for a vendor is not bound in law to explain fully and completely everything which he may be cognizant of affecting the value of the property which is the subject-matter of the contract. Statements, moreover, false, but collateral to the contract, cannot be made available to nullify it. Still less can the expression of an opinion by the vendor, the grounds and reasonableness of which may be examined by the vendee, be relied upon to vitiate the contract. The representation, to avail for such purpose, must be shown to have given rise to the contracting of the other party—there must have been *dolus dans locum contractui*—fraud inducing to the contract—in order that the vendee may obtain relief from the contract into which he has thus fraudulently been induced to enter. (513)

*The fundamental rule, however, that fraud will vitiate every- [*171] thing, is sometimes modified by circumstances, *ex. gr.*, where a person has by fraud been induced to contract, he may elect whether he will adopt the contract or repudiate it; and if, with notice of the fraud, he adopts the contract, he cannot afterwards repudiate it (*t*). (514) Further, where a contract

(*f*) *Rogers v. Hadley*, 2 H. & C. 247.

(513) In order to avoid a contract on the ground of misrepresentation, there must not only have been a misrepresentation of a material fact constituting the basis of the sale, but the purchaser must have made the contract upon the faith and credit of such representations. At least he must so far have relied upon them as that he would not have made the purchase if such representations had not been made. *Taylor v. Fleet*, 1 Barb. 471. And see *Morris Canal Co. v. Everett*, 9 Paige, 168; *Phipps v. Buckman*, 30 Penn St. 402; *Stebbins v. Eddy*, 4 Mason's C. C. 414. If the truth or falsehood of the representations might have been tested by ordinary vigilance and attention, it is the party's own folly if he neglect to do so, and he is remediless. *Foley v. Congill*, 5 Blackf. (Ind.) 18; *Farrar v. Alston*, 1 Dev. (N. C.) 69; *Saunders v. Hatterman*, 2 Ired. (N. C.) 32; *Moore v. Turbeville*, 2 Bibb (Ky.), 602.

For a full discussion of the subject of fraud, misrepresentation, and mistake in contracts, see the following cases: *Hammitt v. Emerson*, 27 Me. 308; *Ayer v. Tilton*, 42 N. H. 407; *Overton v. Morris*, 3 Port. (Ala.) 249; *Gassett v. Wilson*, 3 Fla. 235; *Hubbard v. Briggs*, 31 N. Y. (4 Tiff.) 518; *Terhune v. Dever*, 36 Ga. 648; *Smith v. Babcock*, 2 Woodb. & M. 246; *Warner v. Daniels*, 1 id. 107; *Grimes v. Williams*, 16 Ill. 47; *Elder v. Allison*, 45 Ga. 18; *Frenzel v. Miller*, 37 Ind. 1; *Fisher v. Mellen*, 108 Mass. 503; *Oberlander v. Speiss*, 45 N. Y. (6 Hand) 175.

(514) Where a party determines to avoid a contract on account of fraud, he must give notice of such determination to the other party within a reasonable time after his discovery of the fraud. *Herrin v. Libbey*, 36 Me. 350; *Masson v. Bovet*, 1 Denio, 69; *Lindsley v. Ferguson*, 49 N. Y. (4 Sick.) 623; and, if possible, must put the other party in *statu quo*. *Cobb v. Hatfield*, 46 N. Y. (1 Sick.) 533; *Poor v. Woodburn*, 25 Vt. 284; *Cook v. Gilman*, 84 N. H. 556. But if the subject-matter is of no value at all to either party, it need not be restored. *Perley v. Balch*, 23 Pick. (Mass.) 283. Where both parties have been guilty of a fraudulent intention, the law refuses to interfere, and leaves them as it finds them. *Goudy v. Gebhart*, 1 Ohio St. 262; *Taylor v. Weld*, 5 Mass. 116; *Warburton v. Aken*, 1 McLean, 480; 1 Story's Eq. Jur., § 61. As it is an established rule, both in law and equity, that fraud will never be presumed, the burden of proof is, of course, upon the party alleging the fraud. *Stewart v. Thomas*, 15 Gray (Mass.), 171; *Howe v. Howe*, 99 Mass. 88; *Baldwin v. Parker*, id. 79;

of sale has intervened, preference will sometimes be given to the title of an honest purchaser over that of a vendor who has been cheated and defrauded of his goods. If A., through B.'s fraud, be induced to contract with him for the sale of goods, and the goods be delivered to B. in pursuance of the contract, and B. transfer them *bond fide* and for value to C., C. will have a good title as against A., who afterwards seeks to disaffirm the contract into which he has been inveigled (*u*). The spirit of this proposition favours the quieting of titles to chattel property, and so tends to the expansion of trade, which most flourishes when confidence is best assured.

Nay, in favour of the contract of sale, and to give security to titles resting upon it, our customary law long since deviated from its well-established doctrine, that the absolute owner of a chattel cannot be prejudiced, so far as concerns his right therein, by the act of a third person in reference to it done in his absence without his acquiescence or knowledge, for the general rule is, that the sale of anything vendible, in market overt, (that is, open), shall not only be good between the parties thereto, but also be binding on all those who have any right of property therein (*x*). And for this purpose, the Mirror (*y*) informs us, were tolls established in markets, viz. to testify the making of contracts; for every private contract was discountenanced [** 172*] by law: insomuch, that our *Saxon ancestors prohibited the sale of anything above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses (*z*). Market overt in the country is only held on the special days, provided for particular towns by charter or prescription; but in London every day, except Sunday, is market day (*a*). The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt (*b*); but in London every shop in which goods are exposed publicly to sale, is market overt, for such things only as the owner professes to

(*u*) *White v. Garden*, 10 C. B. 919. (*z*) Leg. Ethel. I., 3; Leg. Edg. Anc. Laws
(*x*) 2 Inst. 713. *Case of Market Overt*, 5 and Inst. Eng. p. 116.
Rep. 84. (*a*) Cro. Jac. 68.
(*y*) C. 1, § 3. (*b*) Godb. 131.

Beatty v. Fishel, 100 id. 448. See *Boynston v. Hubbard*, 7 id. 112; *Gould v. Gould*, 3 Story, 540; *Jackson v. Burgott*, 10 Johns. 457; *Boreing v. Singery*, 2 Har. & Johns. (Md.) 455.

The question as to whether possession by the vendor after the sale of goods constitutes a presumption of fraud, or proof thereof, has undergone much discussion in England and the United States, with varying conclusions. In the Federal courts, and in many of the State courts, it is held that an absolute bill of sale or conveyance, without surrender of possession, is of itself conclusive evidence of fraud. See *Hamilton v. Russell*, 1 Cranch, 310; *Conrad v. Atlantic Ins. Co.*, 1 Pet. 449; *Meeker v. Wilson*, 1 Gall. C. C. 419; *Clayton v. Anthony*, 6 Rand. (Va.) 285; *Brady v. Haines*, 18 Penn. St. 113; *Hutchins v. Gilchrist*, 23 Vt. 82; *Furnsworth v. Shepard*, 6 id. 521; *Thornton v. Davenport*, 1 Scam. (Ill.) 296; *Gibson v. Loe*, 4 Fla. 217; *Hall v. Gaylor*, 37 Conn. 550. In other of the States the later doctrine of the English courts is adopted, namely, that possession of goods by the vendor after a sale of them is only *prima facie* evidence of fraud, which may be explained by proof. See *Briggs v. Parkman*, 2 Metc. (Mass.) 258; *Adams v. Wheeler*, 10 Pick. (Mass.) 199; *Bradeen v. Brooks*, 23 Me. 463; *Cutter v. Copeland*, 18 id. 127; *Johnson v. Willey*, 46 N. H. 75; *Sterling v. Van Olee*, 7 Halst. (N. J.) 285; *Mitchell v. Beal*, 8 Yerg. (Tenn.) 141; *Allen v. Johnson*, 4 J. J. Marsh. (Ky.) 235; *Trotter v. Howard*, 1 Hawks. (N. C.) 320; *Bryant v. Kelton*, 1 Tex. 415; *Barr v. Hatch*, 3 Ohio, 529; *Smith v. Henry*, 2 Bailey (S. C.), 118. In New York the question is set at rest by statute. See 2 R. S. 136.

trade in (c). But a sale by sample is not entitled to the privileges of a sale in market overt (d).

If, then, my goods are stolen from me, and sold, out of market overt, my property in them is not altered, and I may take them wherever I find them. And it is expressly provided by statute 1 Jac. 1, c. 21, that the sale of any goods, wrongfully taken, to any pawnbroker in London, or within two miles thereof, shall not alter the property: for this, being usually a clandestine trade, is therefore made an exception to the general rule. And, even in market overt, if the goods be the property of the crown, such sale (though regular in all other respects) will in no case bind it; though it binds infants, idiots, or lunatics, and men beyond sea or in prison.

So likewise, if the buyer know the property not to be in the seller; or there be any other fraud in the transaction; if he know the seller to be an infant, or feme covert not usually trading for herself; if the sale be not originally and wholly made in the fair or market, or not at the usual hours; the owner's property is not bound * thereby (e). If a man buys his own goods in a [* 173] fair or market, the contract of sale shall not bind him, so that he shall render the price; unless the property had been previously altered by a former sale (f). And, notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice (g). By which wise regulations the common law has secured the right of the proprietor in personal chattels from being divested, so far as was consistent with that other necessary policy, that purchasers, *bona fide*, in an open and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller, though the title of one who honestly purchases a stolen chattel in market overt may be defeated, should its owner prosecute the thief to conviction (h).

But there is one species of personal chattels, in which the property is not easily altered by sale, without the express consent of the owner (i). For the owner's property in a horse that has been stolen is not divested, unless it be sold in a fair or market overt, according to the directions of the statutes 2 Ph. & M. c. 7, and 31 Eliz. c. 12; by which it is enacted, that the horse shall be openly exposed, in the time of such fair or market, for one whole hour together, between ten in the morning and sunset, in the public place used for such sales, and not in any private yard or stable; and afterwards brought by both the vendor and vendee to the book-keeper of such * fair or market: that toll be paid, if any be due; and if not, one [* 174] penny to the book-keeper, who shall enter down the price, colour, and marks of the horse, with the names, additions, and abode of the vendee and vendor; the latter being properly attested. Nor shall such sale take away the property of the owner, if within six months after the horse is stolen he

(c) *Lyons v. De Pass*, 11 Ad. & E. 326; *Lee v. Bayes*, 18 C. B. 601.

(d) *Crane v. London Dock Co.*, 5 B. & S. 313.

(e) 2 Inst. 713, 714; *Peer v. Humphrey*, 3 Ad. & E. 495.

(f) Perk. § 93.

(g) 2 Inst. 713.

(h) 24 & 25 Vict. c. 96, s. 100; *Scattergood v. Sylvester*, 15 Q. B. 506.

A metropolitan police magistrate may order the restitution of stolen property under the stat. 2 & 3 Vict. c. 71, ss. 37, 40. See also stats. 10 & 11 Vict. c. 82, s. 12; 18 & 19 Vict. c. 126, ss. 1, 8; 21 & 22 Vict. c. 73, ss. 1, 2.

(i) 2 Inst. 719.

puts in his claim before some magistrate, where the horse shall be found; and, within forty days more, proves such his property by the oath of two witnesses, and tenders to the person in possession such price as he *bond fide* paid for him in market overt. But in case the requirements before mentioned be not complied with, such sale is utterly void; and, under the former of the two acts, the owner shall not lose his property, but at any distance of time may seize or bring an action for his horse, wherever he happens to find him (*k*).

By the civil law (*l*) an implied warranty was annexed to every sale, in respect to the title (515) of the vendor; but by our law no warranty of title is implied upon the sale of goods, although upon this abstract rule numerous exceptions are engrafted,—as where goods are sold by a shop-keeper in the ordinary course of his business, or under an executory contract, or under circumstances from which a jury may infer a warranty (*m*).

The law concerning implied warranty of the quality of goods sold (*n*) does not admit of being very concisely stated; to avoid prolixity it is below set forth in a series of propositions based respectively upon the authorities cited in the margin, and clothed for the most part in judicial language (*o*).

[* 175] *1st. Where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies; the purchaser takes them at his risk, even though the defect which exists in them is latent, and not discoverable on examination,—at least where the seller is neither the grower nor the manufacturer. The buyer in such a case has the opportunity of exercising his judgment upon the matter,

(*k*) See *North v. Jackson*, 2 Fost. & F. 198.

(*l*) Dig. 21, 2, 1.

(*m*) *Bagueley v. Hawley*, L. R. 2 C. P. 625, 628, and cases there cited.

(*n*) An express warranty must be made at the time of sale, or be incorporated with the

contract; it will otherwise be inoperative, as having no consideration to support it. *Roscorla v. Thomas*, 3 Q. B. 234.

(*o*) See judgm. *Jones v. Just*, L. R. 3 Q. B. 202, 3.

(515) Very generally in the United States it is held that upon all sales of personal property by one in possession, the law implies a warranty of title. See *Sweet v. Colgate*, 20 Johns. 196; *McCoy v. Archer*, 3 Barb. 323; *Edick v. Crim*, 10 id. 445; *Reed v. Gannon*, 3 Daly, 414; *Scranton v. Clark*, 39 N. Y. (12 Tiff.) 290; *Gross v. Kierski*, 41 Cal. 111; *Hoe v. Sandborn*, 21 N. Y. (7 Smith) 552; *Thurston v. Spratt*, 52 Me. 202; *Sherman v. Champlain T. Co.*, 31 Vt. 162; *Williamson v. Sammons*, 34 Ala. 691; *Shattuck v. Green*, 104 Mass. 42. And possession by a bailee or agent of the vendor is the possession of the vendor himself, and the implied warranty of title arises. *Id.*; and see *Cushing v. Breed*, 14 Allen (Mass.), 376; *Hallard v. Bliss*, 12 id. 590. In a sale by executors, administrators, and other trustees, there is no implied warranty of title. *Bingham v. Macey*, 15 Ill. 295; *Forsythe v. Ellis*, 4 J. J. Marsh. (Ky.) 298; *Mookbee v. Gardner*, 2 Har. & Gill. (Md.) 176; *Prescott v. Holmes*, 7 Rich. (S. C.) 9. And so, in case of sales by officers of the law. *Hensley v. Baker*, 10 Mo. 157; *Stone v. Pointer*, 5 Munf. (Va.) 287; *Worthy v. Johnson*, 8 Ga. 236; *Bashore v. Whisler*, 3 Watts (Penn.), 490.

On the sale of a promissory note, the law implies a warranty that it is not paid (*Ellis v. Grooms*, 1 Stew. [Ala.] 47); that the signatures and indorsements upon it are made by persons who have capacity to make a valid contract (*Thrall v. Newell*, 19 Vt. 202); that the signatures are genuine (*Terry v. Bissell*, 26 Conn. 23); and that the note is of the kind and description it purports on the face of it to be. *Id.* On the sale by one person of a judgment recovered by another, a warranty of title is implied, embracing also a warranty that the judgment is due and unpaid, where nothing is said upon the subject. *Furniss v. Ferguson*, 84 N. Y. (7 Tiff.) 485.

and if the result of his inspection be unsatisfactory, or if he distrust his own judgment, he may, if he chooses, require an express warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable (*p*).

2ndly. Where there is a sale of a definite existing chattel, specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty as to quality (*q*).

3rdly. Where a known, described, and defined article is ordered of a manufacturer, although stated to be required by the purchaser for a particular purpose, still, if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer (*r*).

4thly. Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, a warranty is inferred that the said article shall be reasonably fit for the purpose to which it is to be applied. In such a case, the buyer trusts to the manufacturer or dealer, and relies upon his judgment (*s*).

* 5thly. Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has [*176] not had an opportunity of inspecting, it is an implied term in the contract that a merchantable article shall be supplied (*t*).

6thly. Another class of cases is that of goods bought under a specified commercial description by sample or even after inspection of bulk. Here it is an implied term, notwithstanding the sample or inspection, that the goods shall reasonably answer the specified description in its commercial sense. The sample in any such case is looked upon as a mere expression of the quality of the article, not of its essential character, and notwithstanding the bulk be fairly shown or agree with the sample, yet if from adulteration or other cause, not appearing by the inspection or sample, though not known to the seller, the bulk does not reasonably answer the description in a commercial sense, the seller is liable. So that neither inspection of bulk nor use of sample absolutely excludes an inquiry whether the thing supplied was otherwise in accordance with the contract (*u*). (516)

- (*p*) *Parkinson v. Lee*, 2 East, 814. 108; *Shepherd v. Pybus*, 3 M. & Gr. 868;
 (*q*) *Barr v. Gibson*, 8 M. & W. 890. *Biggs v. Parkinson*, 7 H. & N. 955; *Jones v.*
 (*r*) *Uhanter v. Hopkins*, 4 M. & W. 899; *Just*, L. R. 8 Q. B. 197.
Ollivant v. Bayley, 5 Q. B. 288. (*u*) *Mody v. Gregson*, L. R. 4 Q. B. 49, 55-6;
 (*s*) *Brown v. Edgington*, 2 M. & Gr. 279. *Mucfarlane v. Taylor*, L. R. 1 Sc. App. 245.
 (*t*) *Laing v. Fidgeon*, 4 Camp. 169, 6 Taunt.

(516) With regard to quality upon sales of goods, the general rule is, that the law does not imply a warranty. See *Sezias v. Woods*, 2 Caines, 48; *Swett v. Shumway*, 103 Mass. 369; S. C., 3 Am. Rep. 471. The rule is *caveat emptor* (*Otto v. Alderson*, 10 Smedes & Marsh. [Mass.] 476; *Kingsbury v. Taylor*, 29 Me. 508; *Dean v. Mason*, 4 Conn. 428; *Winsor v. Lombard*, 18 Pick. [Mass.] 59); which, however, does not apply to cases of fraud. *Irving v. Thomas*, 18 Me. 418. But in order to constitute a warranty upon a sale it is not necessary that the representation should have been intended by the vendor as a warranty. If the representation is clear and positive, not a mere expression of opinion, and the vendee understands it as a warranty, and, relying upon it, purchases, the vendor cannot escape liability by claiming that he did not intend what his language declared. *Hawkins v. Pemberton*, 51

Within the scope of one or other of the foregoing propositions a state of facts involving a question as to implied warranty of goods sold will probably be found to fall, and where title or quality is expressly warranted the remarks made at a former page (x) are applicable. A question, however, of much practical importance, and by no means free from difficulty, here presents itself. Every contract of sale involves two things, the bargain and the transfer of the property to which it has relation (y), and whether an action is brought for the [* 177] non-delivery or *non-acceptance of the goods, or in respect of their defective quality, a criterion may be needed for determining the measure of damages applicable for such breach of contract. Generally speaking, it is that amount of pecuniary loss which might be reasonably expected in the ordinary course of things to flow from the non-fulfilment of the contract, and to be the natural consequence of it. (517) Damage, however, which actually flowed from the breach of contract may chance to be irrecoverable. Thus the buyer of an article may have sustained a loss from the non-delivery of such article, which he intended to apply to a special purpose, and which, if applied to that special purpose, would have been productive of a certain special amount of profit. Yet the seller cannot be called upon to make good that loss, if it was not within the scope of his contemplation that the thing would be applied to the purpose from which such special profit might result. But the seller should pay damages only to the extent to which he contemplated that, in the event of his not fulfilling his contract by the delivery of the article, the profit which would be realised if the article had been delivered would be lost to the other party—to that extent he ought to pay; for the buyer has lost the larger amount, and there can be no hardship or injustice in making the seller liable to compensate him in damages so far as the seller understood and

(x) *Ante*, p. 156.

(y) *Crane v. London Dock Co.*, 5 B. & S. 317.

N. Y. (6 Sick.) 198; S. C., 10 Am. Rep. 595. See *Beals v. Olmstead*, 24 Vt. 114; *Shull v. Ostrander*, 63 Barb. 130; *Dunham v. Barnes*, 9 Allen (Mass.), 352. In South Carolina and Louisiana a sale for a sound price is held to imply a warranty of soundness against all faults and defects. *Melancon v. Robichaux*, 17 La. Rep. 97; *Dewees v. Morgan*, 1 Martin (La.), 1; *State v. Gaillard*, 2 Bay (S. C.), 19; *Whitefield v. McLeod*, id. 380; *Timrod v. Shoolbred*, 1 id. 324. See *Smith v. Rice*, 1 Bailey (S. C.), 648; *Thompson v. Lindsay*, 3 Brev. (S. C.) 305. But this implied warranty does not extend to defects which are apparent, and which might be discovered by simple inspection, unless fraud has been employed to conceal them. *Dillard v. Moore*, 2 Eng. (Ark.) 166; *Richardson v. Johnson*, 1 La. Ann. 389. And see *Whitefield v. McLeod*, 2 Bay (S. C.), 380.

A warranty is not to be implied from the fact that the seller knows the purpose for which the article is purchased. *Bartlett v. Hoppock*, 84 N. Y. (7 Tiff.) 118; *Mason v. Chappell*, 15 Gratt. (Va.) 572; *Deming v. Foster*, 42 N. H. 165. And it is held that the mere exhibition of a sample at the time of sale does not of itself amount to a warranty that the bulk is of the same quality, if the buyer has an opportunity to inspect the goods. *Beirne v. Dord*, 5 N. Y. (1 Seld.) 95; *Hargous v. Stone*, id. 73; *Waring v. Mason*, 18 Wend. 425. See *Beebe v. Robert*, 12 id. 412; *Andrews v. Kneeland*, 6 Cow. 354; *Williams v. Spafford*, 8 Pick. (Mass.) 259; *Merriman v. Chapman*, 32 Conn. 146.

(517) In an action for breach of warranty, or for deceit in a sale of chattels, the rule of damages is held to be the difference between the actual value of the chattels and the value which they would have borne if they had conformed to the warranty. See *Woodward v. Thatcher*, 21 Vt. 580; *Page v. Parker*, 40 N. H. 47; *Cary v. Gruman*, 4 Hill, 625; *Overbay v. Lighty*, 27 Ind. 27; *Moulton v. Scruton*, 39 Me. 287; *Houghton v. Carpenter*, 40 Vt. 588; *Worthy v. Patterson*, 20 Ala. 172; *Whitmore v. South Boston Iron Co.*, 2 Allen (Mass.), 52.

believed that the article would be applied to the ordinary purposes to which it was capable of being applied (z).

2. A guarantie is a mercantile instrument of much practical importance, which may be under seal, though it is oftener evidenced by writing not under

seal. It is within the scope of the fourth section of the Statute of Frauds, which, *inter alia*, enacts that—"no action shall be brought whereby to charge the defendant upon any special *promise [*178] to answer for the debt, default, or miscarriages of another," unless the "agreement" upon which such action is brought, or some memorandum or note thereof be in writing signed by the party to be charged therewith, or some person thereunto by him lawfully authorized. (518)

The party signing a guarantie thereby undertakes that he will, on the happening of a contingency, become answerable for the debt or default of a third person, and any such undertaking or engagement must, by virtue of the statute, be in writing; if verbal only, "no action shall be brought whereby to charge the defendant" thereupon.

To fall within the statute, however, the promise must be to answer for the debt, default, or miscarriage of another person for which that other remains liable; *ex. gr.*, the defendant, in consideration that the plaintiff would deliver his horse to A., promised that A. should redeliver him safe; this was held to be a collateral undertaking for another, and therefore not enforceable by action without writing; for "where the undertaker comes in aid only to procure a credit to the party, in that case there is a remedy against both, and both are answerable according to their distinct engagements; but where the whole credit is given to the undertaker, so that the other party is but as his servant, and there is no remedy against him, this is not a collateral undertaking" (a). The difference indeed is obvious between a guarantie and a substitution of liability—between the case where the liability of the party originally liable is extinguished and determined, and the case where there is an assumption of liability upon a contingency—the contingency, viz., of some one else making a default in payment (b). A promise within *the statute must be made to that person to whom another is or is about to become chargeable (c). [*179]

The policy of that particular clause of the 4th section of the Statute of Frauds now spoken of, obviously was to diminish fraud and perjury, which either had been found by experience, or were judged likely to arise from trusting to evidence of less authority than that of a written document, for fixing upon a defendant responsibility for a debt or default for which another person was primarily liable. The clause in question was at first thought to have effected its object, but a mode of evading it was devised by shaping the demand, not upon a special promise of the defendant—which alone is within the letter of the statute—but upon a wrong or tort occasioned to the plaintiff by some false or fraudulent representation of the defendant, made in order to induce him (the plaintiff) to contract with some third person, evidence

(z) *Per Cockburn, C. J., Cory v. Thames Iron Works Co.*, L. R. 8 Q. B. 190, and cases there cited; *Ogle v. Earl Vane*, L. R. 8 Q. B. 272.

(a) *Birkmyr v. Darnell*, Salk. 27; *Mallet v. Bazeman*, L. R. 1 C. P. 163, shows that a

contract to give a guarantie must be in writing.

(b) *Forth v. Stanton*, 1 Wms. Saund. 211.

(c) *Hargreaves v. Parsons*, 18 M. & W. 561; *Cripps v. Hartnoll*, 4 B. & S. 414.

of such representation when oral only and insufficient therefore, by reason of the statute, to support an action *ex contractu*, being relied upon to sustain an action founded upon tort (*d*). A practice thus crept in of fixing a person with the debt of another by verbal evidence of a representation as to the solvency or trustworthiness of that other, and proof that credit was given on the faith of that representation, and damage sustained consequent on its incorrectness (*e*). To support such an action proof of fraud was of course needed (*f*), but a jury would be prone to infer fraud from very slight and insufficient proofs. In order therefore to remedy the inconvenience resulting from the systematic evasion of the Statute of Frauds thus resorted to, an evasion for repression of which our common law was ineffectual, Lord Tenterden introduced into the [* 180] statute 9 Geo. 4, c. 14, a section (the 6th) enacting that no action * shall be brought whereby to charge any person upon any representation made concerning the credit, trade, or dealings of any other person to the intent that such person may obtain credit, money, or goods upon it, unless such representation be made in writing, signed by the party to be charged therewith.

There can be no doubt that the above clause of Lord Tenterden's Act has operated beneficially, has prevented much vexatious litigation, and has put a stop to the attempts which had before been successfully made to elude the provisions of the Statute of Frauds having reference to guaranties. This section affects the nature of the evidence which must be adduced to support an action for false representation, not the general principles of law upon which it rests. To sustain such an action there must be injury and damage, and, if proof of these be present, the jury will have to say whether the former produced the latter, for the damage laid and relied upon by the plaintiff must have resulted not too remotely from the alleged injury in order that an action for false representation may be maintainable. Further, as regards the evidence requisite to support such an action: If a comparison be instituted between the 6th section of Lord Tenterden's Act and the 4th section of the Statute of Frauds, we shall find that under the former statute no action can be maintained against a man for falsely representing his friend to be a person of substance, or as one to whom credit might fairly be extended, unless such representation be in writing, signed by himself; whereas, under the 4th section of the Statute of Frauds, one may be sued on an ordinary guarantie to be answerable for another's debt if the promise to pay be given in writing, signed by his authorised agent, *i. e.*, on the Statute of Frauds a person is exposed to be charged by the verbal statement of another that he had authority to sign; under Lord Tenterden's Act this is not so (*g*).

[* 181] * The word "agreement," used in the 4th section of the Statute of Frauds, has been held to include the consideration as well as the promise which it supports (*h*), and in construing a guarantie worded by persons unskilled in legal technicalities, a question often arose of this kind: Did

(*d*) *Lyde v. Barnard*, 1 M. & W. 101.

(*e*) *Per Parke, B., Id.*

(*f*) *Post*, chap. x.

(*g*) *Lyde v. Barnard*, 1 M. & W. 104.

(*h*) *Wain v. Wariters*, 5 East, 10.

(518) This provision of the statute of frauds is in force generally throughout the United States. Contracts of guaranty are to be construed in the same way as other contracts, and should receive a liberal interpretation. See *Dobbin v. Bradley*, 17 Wend. 422; *Lawrence v. McCalmont*, 2 How. (U. S.) 426, 429; *Rindge v. Judson*, 24 N. Y. (10 Smith) 64; *Sickle v. Marsh*, 44 How. 91.

the consideration sufficiently appear on the face of the instrument, or was it to be necessarily inferred from the wording of it? (i) The difficulty experienced in solving this question has been removed by the 3rd section of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), enacting that no guarantie shall be deemed invalid to support an action by reason only that the consideration for the promise does not appear in writing or by necessary inference from the written document. (519) This statutory provision does not render a consideration unnecessary to a valid guarantie, it merely dispenses with the necessity of disclosing or indicating the existence of such consideration upon the instrument itself (k). Now as formerly will a guarantie of a past debt, unless supported by some other consideration, be inefficacious; now as formerly may a nice and difficult question arise upon a guarantie of this kind:—Do its terms clearly import that the defendant's promise was to guarantie a debt previously incurred? or do they point rather in this direction and to this understanding between the parties, that credit shall continue to be extended and additional goods be supplied or money be advanced by the plaintiff to the person guarantied? (l) Fraud and misrepresentation at its inception (m), or a * material alteration afterwards made in it (n), will vitiate a guarantie, [*182] and a guarantie given to or on behalf of a firm will, unless a contrary intention appear, cease upon a change in the constitution of the firm (o).

3. Another clause of the 4th section of the Statute of Frauds enacts that: “No action shall be brought to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.” Agreements falling within this provision of the statute are not uncommon. Any contract of service does so which is to continue for a year, yet not to commence until a future day (p), or any contract for publishing a serial work meant to extend beyond a year (q).

It was long since decided that an agreement falling within this statutory provision must be such as from its terms appears to be incapable of performance within the year. For instance, an action was brought upon an agreement by which the defendant promised for one guinea paid down to give the plaintiff so many on the day of his marriage. The defendant not having been married within a year, the question was whether the agreement ought to have

(i) It was held sufficient in any case, if the memorandum relied upon was so framed that any person of ordinary capacity must have inferred from the perusal of it, that such, and no other, was the consideration upon which the undertaking was given. *Hawes v. Armstrong*, 1 Bing. N. C. 765.

(k) The whole promise must still be in writing. *Holmes v. Mitchell*, 7 C. B. N. S. 361.

(l) *Hoad v. Grace*, 7 H. & N. 494; *Wood v. Priestner*, L. R. 2 Ex. 66, 282.

(m) *Lee v. Jones*, 17 C. B. N. S. 482.

(n) *Bank of Hindustan, China, and Japan v. Smith*, 16 L. J. C. P. 241.

(o) 19 & 20 Vict. c. 97, s. 4.

(p) *Bracegirdle v. Heald*, 1 B. & Ald. 722. See *Cawthorn v. Cordrey*, 13 C. B. N. S. 406.

(q) *Roydell v. Drummond*, 11 East, 142.

(519) Similar statutory provisions have been enacted in some of the United States. As to the proper rule in the absence of any statutory provision, see *Union Bank v. Coster*, 1 Sandf. 563; *Church v. Brown*, 21 N. Y. (7 Smith) 315; *Cardel v. McNiel*, id. 336; *Dunning v. Roberts*, 35 Barb. 463; *Howland v. Aitch*, 38 Cal. 133; *Stephens v. Winn*, 2 Nott & McCord, 872, n; *Neelson v. Sanborns*, 2 N. H. 414. In further illustration of the rule see *Buckley v. Beardslee*, 2 South. (N. J.) 570; *Lent v. Padelford*, 10 Mass. 280; *Miller v. Irvine*, 1 Dev. & Bat. (N. C.) 103.

been in writing. This question was answered in the negative, for "where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary," but where it appears by the whole tenor of the agreement [*183] that it is to be performed after the year, *there a note in writing is necessary (r). The decision thus given might in truth have rested on another ground, for it is now settled that the above statutory provision applies to such contracts only as are not to be performed on either side within the year (s).

The Statute of Frauds further enacts, that in the following cases no verbal promise shall be sufficient to ground an action upon, but at the least some note or memorandum of it shall be made in writing, and signed by the party to be charged therewith, or some one thereunto by him lawfully authorised:—

4. Promise by executor, &c., to answer damages personally.
4. Where an executor or administrator promises to answer damages out of his own estate (t), (520) and
5. Agreement upon consideration of marriage, that is, where a promise is made to do some collateral act in consideration of marriage (u). (521)

It remains only under this head of our subject to observe that where an agreement is by statute required to be in writing, so also must any alteration of it be, which constitutes, in fact, a new contract (x). (522) But though such an alteration of the original contract must be in writing, an agreement

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| (r) <i>Peter v. Compton</i> , Skin. 358. | <i>Maxwell</i> , 1 P. Wms. 618; <i>Caton v. Caton</i> , L. |
| (s) <i>Cherry v. Heming</i> , 4 Exch. 681; <i>Smith v. Neale</i> , 2 C. B. N. S. 67. | R. 2 H. L. 127; <i>Jorden v. Money</i> , 5 H. L. Cas. 185. |
| (t) <i>Forth v. Stanton</i> , 1 Saund. 210. | (x) <i>Marshall v. Lynn</i> , 6 M. & W. 117. |
| (u) <i>Cork v. Baker</i> , 1 Stra. 84; <i>Montacute v.</i> | |

(520) A contract susceptible of performance within the year is held not to be within the statute. *Heath v. Heath*, 81 Wis. 228; *Lyon v. King*, 11 Metc. (Mass.) 411; *Peters v. Westborough*, 19 Pick. (Mass.) 364; *Gault v. Brown*, 48 N. H. 183; *Doyle v. Dixon*, 97 Mass. 211. And so, if it be merely optional with one party to perform within a year or not. *Kent v. Kent*, 18 Pick. (Mass.) 569; *Russell v. Slade*, 12 Conn. 455.

An agreement for a year's service, to commence at a future day, is a contract not to be performed within a year from the time of the agreement, and must be in writing (*Emery v. Smith*, 46 N. H. 151; *Pitkin v. Noyes*, 48 id. 294; *Clark v. Terry*, 25 Conn. 395); and a contract for service for more than a year, although it be subject to be determined within the year, on the happening of a given event, is likewise within the statute. *Herrin v. Butters*, 20 Me. 119; *Doyle v. Dixon*, 97 Mass. 211; *Tuttle v. Sweet*, 81 Me. 555; *Tolley v. Green*, 2 Sandf. Ch. 91. A contract to marry at the end of five years is within the statute, and is void unless in writing. *Derby v. Phelps*, 2 N. H. 515.

This is held not to be applicable to cases where a bond has been given to the judge of probate to pay the debts and legacies of the testator; for such a bond in itself is an admission of sufficient assets, which the executor is estopped to deny. 2 Story on Cont., § 1436; *Cobwell v. Alger*, 5 Gray (Mass.), 67; *Stebbins v. Smith*, 4 Pick. (Mass.) 99.

(521) It appears to be now uniformly held that this provision intends to affect only what are commonly known as marriage settlements. *Dunn v. Thorpe*, 4 Ired. Eq. (N. C.) 7; *Clark v. Pendleton*, 20 Conn. 508; Browne's Stat. of Frauds, § 215. See *Hatcher v. Robertson*, 4 Strobb. (S. C.) 179; *Riley v. Riley*, 25 Conn. 154.

(522) The rule is otherwise in Massachusetts. See *Cummings v. Arnold*, 3 Metc. 486; *Stevens v. Hall*, 9 Cush. 31. And see *Watkins v. Hodges*, 6 Harr. & J. (Md.) 38; *Franklin v. Long*, 7 Gill. & J. (Md.) 407; *Richardson v. Cooper*, 35 Me. 450; *Blood v. Hardy*, 15 id. 61; *Blood v. Goodrich*, 9 Wend. 68, 79.

to waive or abandon it need not be (y); (523) and a verbal alteration of a written contract, where incapable of being enforced in virtue of some statute which renders writing necessary, will not so operate as to prevent either party from recovering on the former contract (z).

II. The class of contracts next to be considered comprises such as by mercantile custom and usage, sanctioned * by various enactments, are in [* 184] writing, *ex. gr.*, bills of exchange (a), cheques, promissory notes, banknotes, and certain contracts of loan and insurance, to which we shall advert briefly in the order mentioned.

II. Contracts required by mercantile custom to be in writing:

1. A bill of exchange is a security, invented among merchants, for the more easy remittance of money from one country to another. It is an open letter of request from A. to B., desiring B. to pay a sum named therein to a third person on A.'s account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A. lives in Jamaica, and owes B., who lives in England, 1000*l.*, now if C. be going from England to Jamaica, he may pay B. this 1000*l.*, and take a bill of exchange drawn by B. in England upon A. in Jamaica, and receive it when he comes thither. Thus does B. receive his debt, at any distance of place, by transferring it to C.; who carries over his money in paper credit, without danger of robbery or loss. This method is said to have been brought into general use by the Jews and Lombards, when banished, in order the more easily to draw their effects out of France and England, into those countries in which they had chosen to reside. But the invention of it was a little earlier: for the Jews were banished out of Guienne in 1287, and out of England in 1290 (b). In mercantile phraseology, such a bill is frequently called a draft. The person who writes this letter is called in law the drawer; he to whom it is written the drawee, and after acceptance, the acceptor; and the third person, to whom it is payable (whether specially named or described as bearer generally) is called the payee.

A bill of exchange, then, is an order by A. on B. to pay * at such a [* 185] time after date, or on demand, or at or after sight, a sum certain, and when this order is accepted by B., B. becomes primarily liable to pay the bill, A. being liable to do so in case of B.'s default. (524)

(y) *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Thomas v. Bishop*, Rep. temp. Hardw. 2. See *Stead v. Dawber*, 10 Ad. & E. 57. 19 & 20 Vict. c. 97, s. 8; 1 & 2 Geo. 4, c. 78,

(z) *Noble v. Ward*, L. R. 2 Ex. 135.

(a) "A bill of exchange is a contract of a very particular nature, depending on the custom of merchants, and must be in writing." s. 2. Generally as to the stamp on a negotiable instrument, see *Tilsley's Stamp Acts*.

(b) 2 Carte, Hist. Eng. 203, 206.

(523) See *Marshall v. Baker*, 19 Me. 402; *Ballard v. Walker*, 8 Johns. Cas. 60; *Justice v. Lang*, 42 N. Y. (3 Hand) 493; S. C., 1 Am. Rep. 576.

(524) Bills of exchange are either *foreign* or *inland*; they are foreign when drawn by a person in one State or country upon a person in another State or country, and they are inland when both the drawer and the drawee reside in the same State or country, and when both drawn and payable in the same State or country, though accepted abroad. Bills drawn by a resident of one State of the Union upon a resident of another State therein, will be considered a foreign bill, and subject to the rules which are applicable to such bills.

The most remarkable incident or quality attaching to a bill of exchange is its negotiability — (525) its transferability from hand to hand. It was a rule of our common law that a chose in action (c) could not be assigned or granted over (d), because it was thought to be a great encouragement to litigiousness if a man were allowed to make over to a stranger his right of going to law; and, in compliance with this ancient principle, the form of assigning a debt is still in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover possession of the money due. And therefore, when in common acceptance a debt is to be assigned over, it must be sued for in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee. But the crown is excepted from the operation of this general rule, and may either grant or receive a chose in action by assignment (e). Various contracts have likewise by mercantile usage, and by express enactment, been withdrawn from its operation, and of such contracts negotiable instruments are the most important.

The payee of a bill of exchange has clearly a property vested in him, not indeed in possession but in action, by the implied contract of the drawer, viz., that, provided the drawee does not accept or pay the bill, the drawer will pay [*186] it. And this property, so vested, may, if the bill be *drawn in the form usual amongst merchants, be transferred and assigned from the payee to any other man; contrary to the general rule of the common law that no chose in action is assignable. This assignment being the life of paper credit, it may be well to mention a few of the principal incidents attending it when regular, and such as to charge the drawer with the payment of the debt to persons other than those with whom he originally contracted.

The quality of negotiability may be imparted to a bill of exchange by the form in which it was originally drawn, or may be communicated to it by indorsement. If indeed the bill be drawn payable to A., A. only can sue upon the bill, which in this case will not be at all or in any sense negotiable. If the bill be drawn payable to "A. or order," A. can, by writing his name *in dorso*, or on the back of the instrument, transfer or assign over to another person, called the indorsee, his right and title to it, either generally or specially, in this latter case making the bill payable to B. by name or order. If the bill be drawn payable to "A. or bearer," it will be perfectly negotiable, and may pass, by delivery, from one person to another *in infinitum*, conferring rights and imposing obligations which are very definite and stringent.

The indorsement, however, of a bill of exchange must, in order to be

(c) The term "chose in action" includes as well the evidence of a right to sue as the right itself, and in virtue of the rule above mentioned, the document evidencing a right or credit could not, at common law, by passing

from hand to hand, confer upon each successive holder of it a right of action.

(d) Co. Litt. 214; *Dixon v. Bonill*, 3 Macq. Sc. App. Cas. 1.

(e) Dyer, 30. Bro. Abr. tit. *Chose in action*, 1 & 4.

1 Wait's L. & Pr. 388; *Commercial Bank of Kentucky v. Varnum*, 49 N. Y. (4 Sick.) 269; *Warren v. Coombs*, 20 Me. 139; *Chenoweth v. Chamberlin*, 6 B. Monr. (Ky.) 60; *Carter v. Burley*, 9 N. H. 558; *Buckner v. Finley*, 2 Pet. (U. S.) 586.

(525) A note which promises to pay money, and also to do some other act, is not negotiable. See *Austin v. Burns*, 16 Barb. 643; *Cook v. Satterlee*, 6 Cow. 108; 1 Wait's L. & Pr. 393.

efficacious, have been made *animo indorsandi*, and when thus made and perfected by delivery the effect of the transaction is to vest in the indorsee the sole and exclusive right to sue upon the instrument. When, indeed, we speak of a bill as being transferable by indorsement, we ordinarily mean that the right to the bill and the right to sue upon it will pass from A. to B. if A. write his name upon the back of the bill and deliver it to B., intending to pass it to him as indorsee. And if in an action by indorsee and holder against indorser of a bill *prima facie* proof be given of the indorsement, the burden will thus be cast on the defendant of showing that the delivery * of [* 187] the bill to the plaintiff was not with the intention of constituting an indorsement in its proper legal sense, but was made with a view to effecting some other object (f). (526)

Inasmuch as a bill of exchange may be put in circulation whilst unaccepted (g), it has been thought convenient to treat of the transfer before treating of the acceptance of a bill, to which latter subject specific reference must now be made. The ordinary course to be pursued by the drawer or holder of an unaccepted bill is this:—The payee, or the indorsee (whether by a general or a particular indorsement) of an unaccepted bill should go to the drawee, and offer his bill for acceptance. If the drawee refuse to accept the bill, the holder may, after giving due notice of dishonour, sue the drawer and indorsers, without waiting till the bill comes due, according to the terms of it (h). If the bill be accepted by the drawee, his obligation is to pay it on the last of the three days (called days of grace) next ensuing that on which it is expressed to fall due (i).

As to the requisites and form of the acceptance;—

No acceptance of an inland bill of exchange will be * sufficient to [* 188] bind or charge any person, unless the same be in writing on such bill;

(f) See *Smith v. Johnson*, 8 H. & N. 222; *Marston v. Allen*, 8 M. & W. 494.

(g) Acceptance is not necessary, though usual and desirable on bills payable at a certain time; but when the bill is payable at or after sight, then acceptance is essential and should not be delayed; because, as the time for payment of the bill does not begin to run till it is accepted, the responsibility of the drawer might be thereby unreasonably protracted, and the holder would lose his remedy against the other parties. Byles on Bills, 9th ed. 174.

(h) *Whitehead v. Walker*, 9 M. & W. 506.

(i) For instance, if a bill or note is dated on the 12th of any month, and made payable ten days, one week, or one month after date, payment must be demanded on the 25th, the 22nd of the same, and on the 15th of the next month respectively. But if the third day of grace falls on a Sunday, the bill or note is payable and due on the Saturday preceding. 39 & 40 Geo. 3, c. 42; 7 & 8 Geo. 4, c. 15.

Days of grace are not allowed upon bills or notes payable on demand; but the rule is perhaps different, if they are made payable at sight. Byles on Bills, 9th ed. 201.

(526) To constitute an indorsement no prescribed formula need be observed. It is governed, like the instrument on which it is made, by those liberal principles of construction which pervade all mercantile contracts—paying little attention to mere technical rules, but endeavoring to ascertain and carry into effect the real intentions of the parties to them. DAVIS J., in *Partridge v. Davis*, 20 Vt. 499. A person may become bound as indorser by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intends to bind himself. Thus, where a party placed the figures “1.2.8.” upon the back of a bill of exchange, by way of substitute for his name, intending thus to bind himself as indorser, it was held a valid indorsement, though it appeared he could write. *Brown v. Butchers and Drovers' Bank*, 6 Hill, 443; S. C., 1 N. Y. Leg. Obs. 149. So, an indorsement is valid, though written with a lead pencil. Id.; *Closson v. Stearns*, 4 Vt. 11; *Partridge v. Davis*, 20 id. 499.

or if there be more than one part of such bill, on one of the said parts, and be signed by the acceptor or some person duly authorised by him (*k*).

Further, although no precise form of words is essential to constitute an acceptance (*l*), (527) the distinction must be noticed between a general and a qualified acceptance; a general acceptance of a bill of exchange being an absolute and unqualified acceptance of the bill according to its tenor (*m*), whereas a qualified acceptance is either conditional, or partial, or varying from the tenor of the bill (*n*); thus, the acceptance of a bill of exchange made payable at the house of a banker or other place, without further expression in the acceptance, is, as against the acceptor, a general acceptance of such bill (*o*). The acceptance of a bill payable at the house of a banker or other place only, and not otherwise or elsewhere, is a qualified acceptance of the bill (*p*).

The acceptance of a bill of exchange is not complete until delivery of the bill by the acceptor, or until he has by his acts or language notified to some person interested in the bill that it has been accepted by him (*q*), but when completed, the acceptance creates a primary liability in the acceptor to [* 189] pay (*r*), and is an engagement * and by him to pay according to the tenor of his acceptance (*s*). (528)

When a bill of exchange has been drawn, accepted, and indorsed, independent and different contracts arise on the parts respectively of those who drew and accepted the bill with the indorsee or holder. The person who accepted the bill is primarily and absolutely liable to pay it; the person who drew the bill is liable only upon the contingencies of default being made by the acceptor, and of the holder's performing certain conditions precedent to his right of suit being complete, viz., presenting the bill, and giving due notice of the failure of the acceptor to pay it upon presentment. The contracts created and evidenced by the bill, so far as regards the principal parties to it, are thus essentially dis-

(*k*) 19 & 20 Vict. c. 97, s. 6; 1 & 2 Geo. 4, c. 78, s. 2.

An acceptance "per procuration" conveys an intimation of a special authority, as to which the party taking the bill should inquire. *Stagg v. Elliott*, 12 C. B. N. S. 373.

(*l*) *Billing v. Devaux*, 3 M. & G. 565.

(*m*) Judgm. *Rosse v. Young*, 2 Brod. & Bing. 165; *Hulstead v. Skelton*, 5 Q. B. 86.

(*n*) *Ex. gr.*, "To pay when in cash for the cargo of the ship *Thetis*" (*Julian v. Shobroke*,

2 Wils. 9); "to pay 100*l.* part thereof" (*Wegersloffe v. Keene*, 1 Stra. 214).

(*o*) 1 & 2 Geo. 4, c. 78, s. 1; Judgm. *Halstead v. Skelton*, 5 Q. B. 86.

(*p*) 1 & 2 Geo. 4, c. 78, s. 1.

(*q*) *Cox v. Troy*, 5 B. & Ald. 474.

(*r*) *Fentum v. Pocock*, 5 Taunt. 192; judgm.

Jones v. Broadhurst, 9 C. B. 181; judgm. *Gibb v. Mather*, 8 Bing. 221; *Tindal v. Brown*, 1 T. R. 167.

(*s*) Judgm. *Halstead v. Skelton*, 5 Q. B. 93, 94.

(527) Acceptance is generally signified by writing the word "accepted" across the face of the bill, accompanied by the party's name; but either without the other is sufficient, at least in the absence of any statutory provision. See *Spear v. Pratt*, 2 Hill, 582; 2 Story on Cont., § 1169. And the same is true of a verbal acceptance. *Id.*; *Spaulding v. Andrews*, 48 Penn. St. 411; *Fisher v. Beckwith*, 19 Vt. 81; *Lemmon v. Boz*, 20 Tex. 329; or of acts clearly indicating an acceptance. *Bank of Rutland v. Woodruff*, 34 Vt. 89.

(528) The drawee named in a bill of exchange is not legally a party to it until he accepts it. But the act of acceptance is like the making of a promissory note; the acceptor then becomes the principal debtor, and he is then liable to pay the amount mentioned in the bill to the payee or holder thereof when it becomes due. If the drawee has funds in his hands which belong to the drawer, he ought, according to mercantile usage, to accept the bill; but his legal obligation to do so is no greater than is that of a debtor to give a promissory note to his creditor for the sum due him. See 1 Wait's L. & Pr. 447; *Couperthwaite v. Sheffield*, 3 N. Y. (3 Comst.) 243; *Chapman v. White*, 6 N. Y. (2 Seld.) 412.

tinct; and according as the action on a bill is brought against this or that party to it, so will the form of declaration in an action framed upon the idea of an undertaking by him necessarily vary. And whatsoever proceedings upon the bill be taken it must be borne in mind that the receipt of a bill of exchange in respect of a debt does not extinguish the debt, it merely postpones the period of payment; and if for some reason or other the remedy upon the bill, when arrived at maturity, fail, a remedy still remains in respect of the original consideration for the bill.

The conditions precedent to enforcing payment of a dishonoured bill as against any party to it intermediate between the holder and the acceptor (who is absolutely liable upon it) are presentment and notice of dishonour.

Conditions precedent to enforcing payment.

Payment of the bill, when refused, must be demanded of the drawer as soon as conveniently may be: for though, when one draws a bill of exchange, he subjects himself to payment of it, if the person on whom it is drawn refuses either to accept or pay it, yet this is subject to a condition that if the bill be not paid when due, the person to whom *it is payable, [* 190] or the holder, shall in convenient time give the drawer notice thereof; for, otherwise, the law will imply it paid: since it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time; when meanwhile all reckonings and accounts might have been adjusted between the drawer and the drawee.

If the bill be an indorsed bill, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer, or the indorser, or, if the bill has been negotiated through many hands, upon any of the indorsers; for each indorser is in the nature of a new drawer, and is a warrantor for the payment of the bill, which is frequently taken in payment as much upon the credit of the indorser as of the drawer. And if such indorser, so called upon, has the name or names of one or more indorsers prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upwards. But the first indorser of a dishonoured bill has nobody to resort to but the drawer.

The bill must be presented for payment in due time, that is, on the last of the three days of grace, to the acceptor, if the acceptance be general (t), or at the place named upon the bill if the acceptance be qualified. (529)

(t) A bill accepted payable generally at a at the banker's. *Halstead v. Skelton*, 5 Q. B. particular banker's may be presented for 92. payment either to the acceptor personally, or

(529) Presentment should be made at a reasonable time of the day. If the maker or acceptor be a banker, demand should be made during banking hours, unless a person be left at the bank to give answer after the close of the regular hours of business. *Bank of Utica v. Smith*, 18 Johns. 280. Business hours, in respect to the time of presentment of paper not payable at a bank, generally range through the whole day, down to the hours of rest in the evening. *Cayuga County Bank v. Hunt*, 2 Hill, 685. See *Lunt v. Adams*, 17 Me. 280; *Farnsworth v. Allen*, 4 Gray (Mass.), 453.

If the maker or acceptor, at the time he executes the paper, resides in a different State from that of the payee or drawer, the paper must be sent thither for presentment. *Taylor v. Snyder*, 8 Denio, 145; *Adams v. Leland*, 30 N. Y. (3 Tiff.) 309; *Foster v. Julien*, 24 N. Y. (10 Smith) 28. But if at such time the parties reside in the same State, and the maker or acceptor subsequently remove into another State, the holder is not bound to send the paper to him for payment. *Id.*; 2 Story on Cont., § 1183.

Presentment for payment must be made at the maturity of the bill. It is a well-known rule that where a creditor gives time to his principal debtor, there being a surety to secure payment of the debt, and does so without consent of, or communication with, such surety, the surety is discharged, because he is thus placed in a new situation, and exposed to a risk and contingency to which he would not otherwise, and according to the terms of his undertaking, have been liable (*u*); and although it is quite competent to [** 191*] a man to give up or renounce a right appertaining to himself alone, he cannot renounce on behalf of another a right which belongs to him; at least, should he assume to do so, our law will protect that other from being prejudiced by the act, and will, perhaps, place him in a position more favourable than that which he had before occupied, and exonerate him from liabilities which had before attached to him. In accordance with the above principle, and on general grounds of expediency, our law will not permit the responsibility of any party to a negotiable instrument intermediate between the holder and the person primarily liable upon it to be prejudiced by any secret understanding between those two persons. If this rule were relaxed, traders would be reluctant to put their names to negotiable paper. The proposition therefore was long since established (*v*) that the holder of a bill of exchange, by giving time to the acceptor, discharges the other parties to it, for the acceptor of a bill is the party principally, and in the first place, liable upon it; the other parties, whose names appear on the instrument as making, drawing, or indorsing it are, in legal contemplation, sureties only (*x*); and, as above intimated, any private agreement between a creditor and his principal for a variation in the terms of their contract is viewed as a fraud upon the surety, who is accordingly, *ipso facto*, discharged and exonerated from the collateral or contingent liability which he had assumed.

The rule ordinarily applicable is that, in order to charge the drawer of a bill, due notice of dishonour must be given him, the want of notice of dishonour being, indeed, tantamount to payment by him, for the law presumes, regard being had to the usual course of commercial dealing, that the bill is drawn on account of effects of the party who drew it being in the hands of the person upon *whom it is drawn, and who [** 192*] accepts the bill. If the drawer has notice that the bill is not paid (or not accepted, for the rule applies also to that state of things), he may then at once withdraw his effects from the hands of him upon whom the bill was drawn, and so may possibly protect himself by getting back the consideration for the bill. If, however, the party last named had at the time of drawing the bill no effects in the hands of the drawee, the reason of the rule requiring notice of dishonour fails, and no notice of dishonour need be given him (*y*).

The notice of dishonour must expressly or by reasonable intendment convey information that the bill has been dishonoured, and demand payment of it (*z*),

(*u*) *Per* Lord Lyndhurst, *Oakley v. Pasheler*, 4 Cl. & F. 288.

(*v*) *Tindal v. Brown*, 1 T. R. 167.

(*x*) To whom, therefore, the stat. 19 & 20 Vict. c. 97, s. 5, applies.

(*y*) *Bickerdale v. Bollman*, 1 T. R. 485, where Buller, J., says—the party drawing the bill “must know whether he had effects

in the hands of the drawee or not, and if he had none, he had no right to draw upon him and to expect payment from him, nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonoured.” *Carter v. Flower*, 16 M. & W. 748.

(*z*) *Solarie v. Palmer*, 2 Cl. & F. 93; *Lewis v. Gomperts*, 6 M. & W. 402, 3.

and although no period can be named within which, under all circumstances, it should be given, the rule upon this point has during the last century become tolerably definite, the question what is reasonable notice having been held to be one of law, regard being had however to the particular facts of the case (a). Whether the post goes out this or that day, at what time, and so forth, are matters of fact; but where the facts pertinent to the matter agitated are established, it becomes a question of law upon these facts what notice may be reasonable and sufficient. The rule now established as regards the time for giving notice is that the party sought to be charged upon the bill is entitled to "prompt notice" of its dishonour by the acceptor. Where the parties live in the same town the notice should be given in time to be received in the course of the day next after the dishonour of the bill, or after the party giving the *notice had himself received notice of dishonour. There must be [*193] due diligence: not that the party is bound to neglect all other business and the moment he receives notice send a notice to those he means to charge. He has a whole day, and so much more as will enable him, using due diligence, to communicate the notice to the party sought to be charged. If there are many indorsers, and the notice in fact travels through them all—if there has been no want of diligence between any two of them—whatever time is occupied the notice will be good. The rule is not imperative that each indorser has a day, but rather that due diligence shall be observed (b). (530)

It is an elementary rule that, to support a simple contract, some sort of consideration is essential, a mere voluntary courtesy will not uphold an *assumpsit* (c). The rule applies generally to simple contracts. Consideration for bill. There is, however, this peculiarity about a bill of exchange that the consideration for the promise evidenced by it will, in the first instance, be presumed. As between the immediate parties to a bill of exchange the *onus* lies on the defendant of showing—by an apt plea and by apt evidence—that he transferred it to the holder without consideration, and that therefore he cannot at suit of the plaintiff be made liable upon the bill. The drawer of an accommodation bill cannot successfully sue the acceptor upon it, and is even liable to be called on to indemnify him if compelled to take up the bill (d). (531) As between parties to a bill of exchange not immediate, the rule is settled that if the defendant in an action upon the bill adduces evidence of fraud connected with its inception, or with its original transfer, the *onus* is thus cast upon the plaintiff of proving that he is a holder of the bill for value. Indeed the presumption in favour of the holder of a bill can only be * in the [*194] case of a genuine instrument. If once a bill is shown to be tainted

(a) *Blesard v. Hirst*, 6 Burr. 2670; *Tindal v. Brown*, 1 T. R. 167. *Aspinall*, Doug. 654; *Heylin v. Adamson*, 2 Burr. 669.

(b) *Tipper v. Rowe*, 18 C. B. 249.

(c) *Ante*, p. 157.

Generally, as to the necessity of presentment and notice of dishonour, see *Rushton v.*

(d) *Beech v. Jones*, 5 C. B. 696.

(530) See, on this subject, *Lawson v. Farmers' Bank*, 1 Ohio St. 206; *Haskell v. Boardman*, 8 Allen (Mass.), 38; *Stephenson v. Dickson*, 24 Penn. St. 148; *Manchester Bank v. Fellows*, 28 N. H. 302; 1 Walt's Law & Pr. 453; 3 Kent's Com. 106; Redfield & Bigelow's L. C. 390, note.

(531) As it regards a consideration the only difference between the case of a bill or note and any other contract, as to the immediate parties, is, that the burden of proof is shifted, and it is incumbent upon the defendant to show the want of consideration or its illegality. See 1 Walt's Law & Pr. 437; *Clark v. Sisson*, 22 N. Y. (8 Smith) 812; S. C., 5 Duer. 408.

with illegality or fraud, the presumption of *bona fides*, which ordinarily arises from the indorsement ceases, and *a fortiori* if the instrument is proved to have been forged (e). (532)

Negotiable instruments form an important part of the currency of the country, and are therefore subjected to the operation of a fundamental rule applicable to money. If such an instrument be transferred in good faith for value before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder; (533) though if a bill of exchange be payable to order, the holder of the bill must perfect his title to it by indorsement in order that he may not be affected by notice of a fraud tainting the instrument perpetrated before it came to his hands. Upon the maxim, *nemo plus juris ad alium transferre potest quam ipse habet*, which comes to us from the Roman law (f), has thus been engrafted an exception with a view to facilitating commercial dealings, and for promoting confidence amongst traders in the paper which they circulate. But the operation of this exception has likewise, with a view to the maintenance of good faith and the suppression of fraud, been, in accordance with equitable principles, limited and restrained (g).

As a general rule no one whose name does not appear upon a bill of exchange can be sued on it, and no one except the holder can sue upon it (h). The holder moreover * of such a negotiable instrument suing upon it may be called on by an apt plea to produce it at the trial. This tends to prevent fraud, and to protect a defendant, who obviously ought not to be in peril of paying the bill twice over. It is also in conformity with the practice of merchants having reference to the payment of the instrument in ordinary course. By the custom of traders the holder of a bill of exchange should (as already stated (i)), present it at maturity to the acceptor, demand payment of its amount, and upon receipt of the money deliver up the bill; the acceptor, upon paying the bill, having a right to its possession for his own security, and as his voucher and discharge *pro tanto* in the account between himself and the party who drew upon him (k).

(e) *Mather v. Lord Maidstone*, 1 C. B. N. S. 273.

(f) Dig. 50, 17, 54.

(g) *Whistler v. Forster*, 14 C. B. N. S. 248.

The unauthorized alteration of a bill of exchange, if material (*Aldous v. Cornwell*, L. R. 3 Q. B. 573), though made by a stranger, will vitiate it. *Master v. Miller*, 4 T. R. 320; 2 H. Bla. 140; *Hirschfeld v. Smith*, L. R. 1 C. P. 340.

(h) The holder of a bill may bring actions against the acceptor, drawer, and all the indorsers at the same time; but though he may obtain judgments in all the actions, yet he can recover but one satisfaction for the value of the bill. See also 18 & 19 Vict. c. 67, s. 6. (i) *Ante*, p. 190.

(k) Judgm. *Hansard v. Robinson*, 7 B. & C. 90, 94.

(532) See the following American cases in illustration of the doctrine in the text: *Clark v. Pease*, 41 N. H. 414; *Perrin v. Noyes*, 39 Me. 384; *Farmers & Citizens' Bank v. Noxon*, 45 N. Y. (6 Hand) 763; *Bertrand v. Barkman*, 18 Ark. 150; *Hutchinson v. Boggs*, 28 Penn. St. 294; *Sloan v. Union B. Co.*, 67 Id. 470; *Woodman v. Churchill*, 52 Me. 58; *Spiller v. James*, 32 Ind. 202; *Burson v. Huntington*, 21 Mich. 415; *Roberts v. Hall*, 37 Conn. 205; *Wilson v. Lazier*, 11 Gratt. (Va.) 477.

(533) In a recent American case, in which the authorities, English and American, are carefully considered, the rule is stated to be, that one who purchases negotiable paper before due for a valuable consideration, in good faith, and without actual knowledge or notice of any defect of title, holds it by a title valid as against every other person. *Seybel v. National Currency Bank*, 54 N. Y. (9 Sick.) 288; affirming S. C., 4 Abb. N. S. 352; 2 Daly, 383. And see *Phelan v. Moss*, 67 Penn. St. 59; *Spooner v. Holmes*, 103 Mass. 503; *Gould v. Stevens*, 43 Vt. 195.

The rule above stated was in its policy sound, as perhaps might be said of almost every rule adopted into the practice of merchants, originating in necessity and tested by long experience. Nevertheless the particular rule adverted to might occasionally, if not relaxed, be productive of hardship—perhaps might work positive injustice. The holder of a bill of large amount losing it through the negligence of a clerk or other agent, in the absence of personal default, might be without remedy upon it. Therefore the legislature interposed, and by section 87 of the second Common Law Procedure Act (17 & 18 Vict. c. 125), enacted that in case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court, or a judge, to order that the loss of such instrument shall not be set up, provided a satisfactory indemnity be given against the claims of any other person upon such instrument. (534)

The procedure upon a bill or note has also been simplified and amended by the under-mentioned statute (*l*).

* An inland bill of exchange is drawn and payable here, or drawn [*196] in one part and payable in any other part of the British Islands (*m*).

Foreign bill. A bill drawn or payable elsewhere is (except for stamp purposes (*n*)) a foreign bill (*o*). Such a bill is usually drawn in parts which circulate together, at one or more “usances,” the “usance” being the period for payment customary as between the places at which respectively the bills is drawn and made payable. (535)

The acceptance of a foreign bill of exchange in this country might formerly have been written or oral, or evidenced by the conduct of the acceptor (*p*); now, however, no acceptance of a foreign bill of exchange will suffice to charge any person unless it be in writing on such bill, or on one part of such bill, and be signed by the acceptor, or some person duly authorised by him (*g*).

Payment of any part of a foreign bill is conditional on the other parts of like tenor and date as itself remaining unpaid at maturity; and if default be made in payment, the bill must be protested by a notary before proceedings can be taken upon it. If acceptance of such bill be refused, it may be accepted

(*l*) 18 & 19 Vict. c. 67, which provides that a writ of summons in a special form may, within six months after a bill of exchange or promissory note has become due and payable, be issued, and to this writ an appearance within twelve days from the date of service, can only be entered by leave of a judge on disclosing good grounds of defense, or on payment into court of the sum indorsed on the writ. On an affidavit of service, or leave given to proceed, final judgment may, in case of the defendant's non-appearance, be signed, and execution may be had thereupon. Leave to appear to the writ may, however, under special circumstances, be given, even after

judgment, execution in this case being either stayed or set aside.

See *Agra Bank v. Leighton*, L. R. 2 Ex. 56.

(*m*) Great Britain, Ireland, Man, Guernsey, Jersey, Alderney, and Sark. 19 & 20 Vict. c. 97, s. 7.

(*n*) *Griffin v. Weatherby*, L. R. 8 Q. B. 753.

(*o*) As to the stamp thereon, see 17 & 18 Vict. c. 88, s. 5. (*Pooley v. Brown*, 11 C. B. N. S. 566.) 27 & 28 Vict. c. 56, s. 2.

(*p*) *Clarks v. Cock*, 4 East, 57; *Wynns v. Raikes*, 5 id. 514; *Harvey v. Martin*, cited 1 Camp. 425; Judgm. *Jeune v. Ward*, 1 B. & Ald. 653, 657.

(*g*) 19 & 20 Vict. c. 97, s. 6, operative from Dec. 31, 1856.

(534) Provision has been made by statute in some of the States of the Union for a recovery upon negotiable instruments which are lost. See, as to New York, 2 R. S. 406, § 75.

To entitle a party to recover on a lost instrument the proof of the genuineness of the original must be positive. *Slone v. Thomas*, 13 Penn. St. 209.

(535) See 1 Wait's Law & Pr. 401; *Wells v. Whitehead*, 15 Wend. 527.

[*197] *supra* protest, for "the honour * of" the drawee or any indorser by a stranger, who thereby undertakes to pay the bill if the drawee or indorser do not (*r*); the party for whose honour the acceptance was thus made, and all antecedent parties to the bill, being liable to the acceptor *supra protest*, for damages which he may incur by reason of his acceptance (*s*).

The most serious difficulty arising upon a foreign bill is where a conflict occurs between the laws of the country in which it was drawn, accepted, or indorsed, and those which here obtain. The maxim *lex loci regit actum* needs here to be applied—sometimes under perplexing circumstances (*t*).

2. The relation of banker and customer is of this kind:—The banker is the depository of the customer's money, which he, in compliance with usage, undertakes to pay out from time to time to the customer's order

2. Cheque. evidenced by his cheque. A cheque is in fact an inland bill of exchange, drawn upon the banker, and payable to the bearer on demand (*u*). It differs however from a bill in some particulars, for instance, whereas a bill of exchange is drawn upon a person who is expected to, and in the ordinary course does, accept it, a common cheque, though drawn upon a banker, is not accepted by him; it is understood to be a request or order to pay money *instantly* when the order is presented, and accordingly does not need to be accepted (*x*). (536) A cheque passes from hand to hand upon the faith reposed in the maker of it, and a confidence that there are funds to his credit at the banker's sufficing for liquidation of the cheque. Further, as a cheque upon [*198] a banker is not usually accepted, so neither is it usually * indorsed.

It may, however, be so, and an action will then lie by the holder against an indorser of the instrument (*y*). The crossing of a cheque, which indicates that it must be passed through a banker's for presentment, is another characteristic of this instrument (*z*).

Upon the implied undertaking of the banker his liability to a customer almost wholly depends, and any breach of duty by the banker causing direct damage to his customer would be actionable (*a*). A banker having in hand sufficient funds of a customer, is bound to honour his cheque, and liable in an action founded on contract or breach of duty for not doing so (*b*). The banker must decide as to the genuineness of a cheque drawn upon him, and should he

(*r*) *Hoare v. Cazenove*, 16 East, 391. See 6 & 7 Will. 4, c. 58.

(*s*) Byles on Bills, 9th ed. 259.

(*t*) See, for instance, *Bradlaugh v. De Rin*, L. R. 8 C. P. 538; *Lebel v. Tucker*, L. R. 8 Q. B. 77.

(*u*) The idea of negotiability as attaching to an instrument analogous to a banker's cheque was not made definite prior to the decision in *Grant v. Vaughan*, 3 Burr. 1516.

(*x*) Days of grace are not allowed upon a cheque.

(*y*) *Keene v. Beard*, 8 C. B. N. S. 372.

(*z*) 19 & 20 Vict. c. 95; 21 & 22 Vict. c. 79, ss. 1, 8.

(*a*) *Hardy v. Venesey*, L. R. 3 Ex. 107.

(*b*) *Marzetti v. Williams*, 1 B. & Ad. 415; *Gray v. Johnston*, L. R. 3 App. Cas. 1.

(536) That checks are not entitled to days of grace see *Bowen v. Newell*, 8 N. Y. (4 Seld.) 190; *Minturn v. Fisher*, 4 Cal. 85; *Morrison v. Bailey*, 5 Ohio St. 13; *Andrew v. Blachly*, 11 id. 89; *Ivory v. Bank of State of Missouri*, 36 Mo. 475; *Henderson v. Pope*, 39 Ga. 361. Post-dated checks are common, and are payable on the day of their date, although negotiated beforehand. *Taylor v. Sip*, 1 Vroom (N. J.), 284.

Where the holder of a check presents the same to the drawee when due, and procures it to be certified instead of paid, it is as between him and the drawer a payment, and the latter is discharged from liability thereon. *First National Bank of Jersey City v. Leuch*, 52 N. Y. (7 Sick.) 850.

pay a forged cheque, must, in the absence of gross negligence by his customer, bear the loss (c). If a bill be accepted by a customer, payable at his bankers, the making the acceptance payable there is tantamount to an order on the part of the acceptor that the banker shall pay the bill to the person who, according to the law merchant, may be capable of giving a good discharge for it. Supposing that the bill has in this case been originally made payable to order, the acceptance payable at a banker's operates as authorising him to pay the bill to any one who shall become holder of it by a genuine indorsement. Supposing, again, that the bill has been originally made payable to bearer, the acceptance payable at a banker's operates as authorising him to pay the bill to any one who seems to be the holder of it. The banker impliedly undertakes to pay the bill accordingly, i. e. in strict pursuance of, and in conformity with the authority given to him by his customer. He cannot, therefore, * debit his customer's account with any payment not made in [* 199] accordance with such authority (d).

The ordinary period of limitation, viz., six years, runs, of course, as against the recipient and holder of a cheque. A question, however, may arise of this kind. Is the holder entitled to retain the cheque thus long without a possibility of being in that interval prejudiced as regards his remedy against the maker of the cheque, by the delay in presenting it for payment. For resolving this question, a rule has been found needful, defining the period within which presentment of a cheque must be made in order that the holder of it may, in case of failure of the banker on whom it is drawn, have redress against the party who transferred the cheque. The holder of the cheque is bound to present it for payment on the day after that on which he received it, or if the cheque be on a banker in a distant town, the holder is bound to send it to his agent there for presentment by the post of the day after that on which he had it, the agent having the following day in which to present the instrument for payment (e). (537) This rule has been held to apply not merely as between the parties to the cheque, but as between the banker and his customer, unless, indeed, circumstances exist where a contract or duty on the part of the banker may be implied to present the cheque earlier for payment, or to defer presentment of it till a later period (f).

* 3. A promissory note, or note of hand, is a plain and direct engagement in writing, to pay a sum specified (g) at the time therein limited (h) [* 200]

(c) *Young v. Grote*, 4 Bing. 258; *Hall v. Fuller*, 5 B. & C. 750.

(d) *Roberts v. Tucker*, 16 Q. B. 560. By stat. 16 & 17 Vict. c. 59, s. 19, which applies to a draft on a banker, payable to order on demand, the banker is not responsible for the genuineness of an indorsement on such draft.

(e) *Rickford v. Ridge*, 2 Camp. 587.

(f) The application of the above rule may be thus shown:—A. is the customer of a country bank, into which he pays to the credit of his account there a cheque drawn upon a bank situate in some other town, X. If the payment by the customer is made on Friday, his bankers ought to forward the cheque on Saturday to their agent at X. for

presentment to the drawees, and the agent will have discharged his duty in presenting the cheque on Monday to these last named parties. See *Hare v. Henty*, 10 C. B. N. S. 65; *Bailey v. Bodenham*, 38 L. J. C. P. 252.

(g) A promissory note under 5l. payable to bearer on demand is illegal. See stat. 48 Geo. 3, c. 88, s. 2; 7 Geo. 4, c. 6, s. 8; 9 Geo. 4, c. 65, s. 1; 26 & 27 Vict. c. 105.

(h) As in the case of a bill of exchange, *ante*, p. 185.

The days of grace (*ante*, p. 187) are allowed on a promissory note (*Brown v. Haradin*, 4 T. R. 148), even when payable by instalments (*Oridge v. Sherborne*, 11 M. & W. 874).

(537) See *Smith v. Miller*, 43 N. Y. (4 Hand) 171; S. C., 3 Am. Rep. 690; *Bickford v. First National Bank of Chicago*, 42 Ill. 288; *Veasie Bank v. Winn*, 40 Me. 60; *Ritchie v. Bradshaw*, 5 Cal. 228; *Taylor v. Sip*, 1 Vroom (N. J.), 284.

3. Promissory note. to a person therein named, or sufficiently indicated (*i*), or to his order, or to bearer. Promissory notes are, in virtue of the statute 3 & 4 Ann. c. 9 (*k*) (made perpetual by 7 Ann. c. 25, s. 3), assignable and indorsable in like manner as bills of exchange (*l*).

What has been said of bills of exchange is in general applicable also to promissory notes, that are indorsed over, and negotiated from one hand to another; only that a promissory note is in form simpler (*m*) than a bill, inasmuch as at its inception there are but two parties to such instrument, the maker and the payee, the law considering a promissory note somewhat in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the maker, the several indorsees of a promissory note have the same remedy, as upon bills of exchange, against the prior indorsers.

[* 201] * A promissory note, although made payable on demand, is not necessarily intended to be presented speedily, but is often rather meant to be a continuing security (*n*), and presentment of such a note, unless expressly required therein, is not needed as a condition precedent to charging the maker of the note (*o*).

4. An ordinary bank note is a promissory note, payable to bearer on demand, and passes from hand to hand by delivery, entitling the holder *pro temp.* to demand cash for his note from the bank by which it was issued, and at which it is made payable.

The title of the *bona fide* holder of a bank note cannot be impugned upon proof that the note had, before coming for value into his hands, been stolen from its rightful owner. A bank note passes in currency like cash (*p*), so that its previous history need not be enquired into by a transferee thereof; confidence on the part of the public is thus encouraged in that paper which represents a metallic currency. They ought merely to satisfy themselves that the thing offered by way of payment is genuine; if forged or worthless, a person taking the note will, however, in general, have a remedy as against his immediate transferor in respect of the consideration given for it (*q*); though laches on the part of the holder of a country note in presenting it for payment may, in the event of the failure of the bank which issued it, preclude him altogether from recovering (*r*). (538)

(*i*) *Holmes v. Jaques*, L. R. 1 Q. B. 376.

(*k*) This enactment, which extends also to foreign notes (*Milne v. Graham*, 1 B. & Cr. 193; *De la Chaumette v. Bank of England*, 2 B. & Ad. 835), was made mainly in consequence of the refusal of the judges to recognise the practice of merchants in negotiating promissory notes in like manner as bills of exchange. (*Clarke v. Martin*, 3 Ld. Raym. 757.) As to the commencement of the recognition of inland bills by the English courts, see *Buller v. Crips*, 6 Mod. 29.

(*l*) "A promissory note is not a personal chattel in possession, but a chose in action of a peculiar nature, which has indeed been

made by statute assignable and transferable according to the custom of merchants, like a bill of exchange: yet still it is a chose in action, and nothing more." *Gaters v. Madeley*, 6 M. & W. 426.

(*m*) A promissory note may, however, be joint or joint and several, and difficulties may hence occur in regard to its construction.

(*n*) *Brooks v. Mitchell*, 9 M. & W. 18.

(*o*) *Norton v. Ellam*, 2 M. & W. 461; *Sands v. Clarke*, 8 C. B. 751.

(*p*) *Miller v. Race*, 1 Burr. 452.

(*q*) *Jones v. Ryde*, 5 Taunt. 488.

(*r*) *Camidge v. Allenby*, 6 B. & C. 273.

(538) If a bank receive payment in counterfeit notes, purporting to be its own issue, it will be bound thereby, because, by a rule of public policy, the officers of a bank are bound absolutely to know whether notes presented to them as their own are spurious or not. *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333; 1 Story on Cont., § 530; *Gloucester Bank v. Salem Bank*, 17 Mass. 83; *Levy v. Bank of U. S.*, 4 Dall. 234.

The issue of negotiable instruments by banking copartnerships and companies has, by reason of the exclusive privileges long since conceded to the bank of England (s), and on other considerations, from time to time been

* regulated and restricted by the legislature. And, in pursuance of the policy thus adopted, various statutes [* 202]
Issue of negotiable instruments by banks. have been passed enacting generally as under:—

Banking copartnerships in England consisting of not more than six persons, may (except within the city of London or three miles therefrom), under certain regulations, issue unstamped promissory notes and bills payable at or within seven days after sight, or within seventy-one days after date (t).

It was formerly unlawful for banking companies of more than six persons, during the continuance of the privileges of the Bank, to borrow, owe, or take up any money on their bills or notes payable on demand, or at any time less than six months after date. This restriction was, however, relaxed by the 7 Geo. 4, c. 46, which permitted banking companies of more than six members to make and issue their bills and notes at any place beyond sixty-five miles from London (u), payable on demand, or otherwise, at some place or places specified therein and beyond sixty-five miles from London; such companies not having any place of business as bankers within that distance from London.

Again, the stat. 3 & 4 Will. 4, c. 83, authorized any banking company of more than six members to make their bills or notes payable in London by their agent, or to draw any bill or note upon any such agent in London, payable on demand, or otherwise, in London; but by the * 3 & 4 Will. 4, c. [* 203] 98, s. 2, no such company can, during the continuance of the privileges of the Bank of England, make or issue in London, or within sixty-five miles thereof, any bill, or note, or engagement for the payment of money on demand, or upon which any person holding the same may obtain payment on demand; though it is lawful for any corporation or partnership transacting banking business at a greater distance than sixty-five miles from London, and not having any house of business or establishment as bankers in London, or within sixty-five miles thereof, to make and issue their bills and notes, payable on demand, or otherwise, at the place of issue, being more than sixty-five miles from London, and also in London, and to have an agent or agents in London, or at any other place at which such bills or notes shall be made payable, for the purpose of payment only. But no such bill or note shall be for any sum less than 5*l.*, or be re-issued in London, or within sixty-five miles thereof.

The authority contained in the stat. 3 & 4 Will. 4, c. 83, extends only to companies of more than six members carrying on business beyond sixty-five miles from London. It was indeed at one time supposed that the statute referred to prohibited companies of more than six members from carrying on any banking business within the above-mentioned limits; but the doubts on

(s) See, particularly, stats. 39 & 40 Geo. 3, c. 28, s. 15; 3 & 4 Will. 4, c. 98; 7 & 8 Vict. c. 82, s. 27. restrictions were, from the passing of that act (July 19, 1844), placed upon bankers.

(t) Stat. 9 Geo. 4, c. 28. This statute contains (s. 15) a saving of the privileges of the Bank of England.

By the 7 & 8 Vict. c. 82, s. 10, no new bank of issue was allowed to be created subsequent to May 6, 1844; and by s. 11, further

(u) The restriction as to distance did not extend to bills for the amount of 50*l.* or upwards, payable in London or elsewhere, at any period after date or after sight; and this limit of 50*l.* seems to have been removed by subsequent enactments. See 3 & 4 Will. 4, c. 83, s. 2; c. 98, s. 2; 7 & 8 Vict. c. 82, s. 26.

this head were removed by the 3rd section of the stat. 3 & 4 Will. 4, c. 98, enacting that any company of more than six persons may carry on the business of banking in London, or within sixty-five miles thereof, provided such company do not borrow, owe, or take up in England any money on their bills or notes payable on demand, or at less than six months from the borrowing thereof.

It has since been made lawful for any banking company, though exceeding six in number, carrying on business in London or within sixty-five miles [*204] thereof, to draw, accept, or indorse, bills of exchange not being * payable to bearer on demand, notwithstanding any previous statute to the contrary (x).

Lastly, nothing contained in the recent statute 27 & 28 Vict. c. 32 (y), empowers any copartnership to carry on the trade of bankers in London or within sixty-five miles thereof who were not authorized to do so under the pre-existing law.

It remains but to add upon this part of our subject, that the courts have always shown a disposition to protect the privileges of the Bank of England, and to discountenance any attempts at evading the restrictions which have for the benefit of that establishment been placed upon other banking companies (z).

5. Before considering certain contracts of loan and insurance which seem properly to fall under our present head, a few introductory remarks may be needful respecting a simple loan of money, to the efficacy of which writing, of course, although often used to evidence it, is not essential.

Borrowing is a contract by which a qualified property in money may be transferred to the borrower; either gratuitously or for a price, a stipend, or additional recompense for its enjoyment. It is a contract whereby the possession of and a transient property in money is transferred for a time or particular purpose, on condition that the money borrowed be restored so soon as the time is expired or purpose has been accomplished; together with the price or stipend either expressly agreed on by the parties, or left to be implied by law. By this mutual contract, the borrower gains a temporary property in the money borrowed, accompanied with an express or implied condition to restore it, and the owner or lender retains a [*205] * reversionary interest in the same, and acquires a new property in the price or reward.

There is one species of this price or reward, the most usual of any, concerning which good and learned men in former times perplexed themselves, by raising doubts about its legality *in foro conscientiæ*. That is, when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for its use; which generally is called interest by those who think it lawful, or, when excessive, usury. The enemies to interest in general have indeed made no distinction between that and usury, holding any increase of money to be indefensible. And this opinion they partly

(x) 7 & 8 Vict. c. 32, s. 26.

(y) Intituled, "An Act to enable certain banking copartnerships which shall discontinue the issue of their own bank notes to sue and be sued by their public officer."

(z) *Bank of England v. Anderson*, 3 Bing. N. C. 589; 2 Keene, 328; *Booth v. Bank of England*, 7 Cl. & F. 509.

grounded on the prohibition of it by the law of Moses among the Jews, and condemned the practice of taking interest, as being contrary to the divine law, both natural and revealed. The canon law (*a*), moreover, proscribed the taking any, the least, increase for the loan of money as a mortal sin.

But, in answer to this, it has been observed, that the Mosaical precept was clearly a political, not a moral ordinance. It only prohibited the Jews from taking usury from their brethren the Jews; but in express words permitted them to take it of a stranger (*b*); which shows that the taking of moderate usury, or a reward for the use, for so the word signifies, is not *malum in se*; since it was allowed where any but an Israelite was concerned.

Moreover, although, as noticed at a former page (*c*), money was originally used only for the purposes of exchange, yet the laws of any state may be well justified in permitting it to be turned to the purposes of profit, if the convenience of society (the great end for which money was invented) require it. And that the allowance of interest tends greatly to the benefit of the public, especially in a trading country, appears from the generally * acknowl- [* 206] edged principle, that commerce cannot subsist without mutual and extensive credit. Unless money therefore can be borrowed, trade cannot be carried on: and if no premium were allowed for the hire of money, few persons would care to lend it; or at least the ease of borrowing at a short warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkish superstition and civil tyranny, when interest was laid under a total interdict, commerce was also at its lowest ebb, and fell entirely into the hands of the Jews and Lombards: but when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit; and introduced with itself its inseparable companion, the doctrine of loans upon interest. And, as to any scruples of conscience, since all other conveniences of life may either be bought or hired, but money can only be hired, there seems to be no greater oppression in taking a recompense or price for the hire of this, than of any other convenience. To demand an exorbitant price is equally contrary to conscience, for the loan of a horse, or the loan of a sum of money: but a reasonable equivalent for the temporary inconvenience, which the owner may feel by the want of it, and for the hazard of his losing it entirely, is not more immoral in one case than it is in the other. Indeed the absolute prohibition of lending upon any, even moderate interest, would introduce the very inconvenience which it might seem meant to remedy. The necessity of individuals will make borrowing unavoidable. Unless profit for the loan of money were allowed by law, there would be but few lenders; and those principally bad men, who would break through the law, and take a profit; and then would endeavour to indemnify themselves from the danger of the penalty, by making that profit exorbitant.

Therefore, as well in other countries as in our own, where laws against usury have existed, a capital distinction has been made between a moderate and an exorbitant * profit for the use of money. The Romans at one time [* 207] allowed *centesimæ*, one *per cent.* monthly, or twelve *per cent. per annum*, to be taken for common loans; and Justinian (*d*) reduced it to four *per cent.*; but allowed higher interest to be taken of merchants, because there

(a) Decretal. l. 5, tit. 19.

(b) Deut. xxiii. 20.

(c) *Ante*, p. 160.

(d) Cod. 4. 32. 26. Nov. 88, 84, 85.

the hazard was greater. Grotius informs us (e), that, in Holland, the rate of interest was eight *per cent.* on common loans, but twelve to merchants. And Lord Bacon was desirous of introducing a similar policy in England (f): but our law established one standard for all alike, where the pledge of security itself was not put in jeopardy. With us the rate of legal interest, during the existence of usury laws, varied and decreased according as the quantity of specie in the kingdom increased by accessions of trade, the introduction of paper credit, and other circumstances (g). Until, in the year 1854, all the then existing laws against usury were, by the 17 & 18 Vict. c. 90, entirely repealed (h). (539)

The exorbitance or moderation of interest for money lent depends, in truth, upon two circumstances: the inconvenience of parting with it for the present, and the hazard of losing it entirely. The inconvenience to individual lenders can never be estimated by laws; the current rate, therefore, of interest must depend upon the usual or general inconvenience. This results entirely from quantity of specie or current money in the kingdom: for, the more specie there is circulating in any nation, the greater superfluity there will be, beyond what [*208] is necessary to carry * on the business of exchange and the common concerns of life. In every nation or public community, there is a certain quantity of money thus necessary; which a person well skilled in political arithmetic might calculate almost as exactly, as a private banker could estimate the demand for running cash in his own till: all above this necessary quantity may be spared, or lent without much inconvenience to the respective lenders; and the greater this national superfluity is, the more numerous will be the lenders, and the lower will the current rate of interest ordinarily be: but, where there is not enough circulating cash, or barely enough, to answer the daily uses of the public, interest will be proportionably high; for lenders will be but few, as few can submit to the inconvenience of lending.

So also the hazard of loss has its weight in the regulation of interest: the better the security, the lower will the interest be; the rate of interest being generally in a compound ratio, formed out of the inconvenience, and the hazard. And as, if there were no inconvenience, there should be no interest but what is equivalent to the hazard, so, if there were no hazard, there ought to be no interest, save only what arises from the mere inconvenience of lending. Thus, if the quantity of specie in a nation be such, that the general inconvenience of lending for a year is computed to amount to three *per cent.*: a man having money by him will perhaps lend it upon good personal security at five *per cent.*, allowing two for the hazard run; he will lend it upon landed security or

(e) De Jur. Bell. et Pa. 2. 12. 22.

(f) Essays, c. 41.

(g) Thus the statute 37 Hen. 8, c. 9, confined interest to 10 *per cent.*, and so did the statute 18 Eliz. c. 8. But as, through the encouragements given in her reign to commerce, the nation grew more wealthy, so, under her

successor, the statute 21 Jac. 1, c. 17, reduced it to eight *per cent.*; as did the statute 12 Car. 2, c. 13, to six; and the statute 12 Ann. st. 2, c. 16, to five *per cent.* yearly.

(h) Sect. 1. The above statute does not affect the law as to pawnbrokers, s. 4.

(539) For a full discussion of the subject of interest on money and usury, see 1 Wait's Law & Pr. 548 to 579. The English statutes against usury and gaming have been adopted generally throughout the United States (see *Unger v. Boas*, 13 Penn. St. 601; *Mordecai v. Dawkins*, 9 Rich. [S. C.] 262); but the tendency of the present day is toward the repeal of the laws relating to usury. See 3 Kent's Com. 80, note a.

mortgage at four *per cent.*, the hazard being proportionably less; but he will lend it to the state, on the maintenance of which all his property depends, at three *per cent.*, the hazard being none at all. But formerly the hazard might sometimes have been greater than the rate of interest allowed under a restrictive law would compensate. And this gave rise to various species of contracts by way of insurance or otherwise, which will here be briefly adverted to.

* Bottomry (which originated from permitting the master of a ship, [* 209] in a foreign country, to hypothecate the ship in order to raise money to refit (i) is in the nature of a mortgage of a ship; when the master takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the ship (*partem pro toto*) as a security for its re-payment. In which case, it is understood, that, if the ship be lost, the lender loses also his whole money; but, if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender (k). In this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent, and nothing short of an actual total loss will discharge the borrower (l). (540)

If the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage, then

(j) The circumstances under which the master is authorized to raise money on the credit of the owner or on bottomry, are set forth in *The Karnak*, L. R. 2 Adm. 289; *The Great Eastern*, id. 88; *The Gratitude*, 3 Rob. 240; *Benson v. Chapman*, 2 H. L. Cas. 696. See also 19 & 20 Vict. c. 97, s. 8.

(k) Instruments of bottomry are in use in all countries wherein maritime commerce is carried on. The lender of the money is entitled to receive a recompense, called, in the

civil law, "*periculi pretium*," to which no person can be entitled who does not take upon himself the peril of the voyage. *Simonds v. Hodgson*, 3 B. & Ad. 57.

See also *Moll. de Jur. Mar.* 361; *Malynes, Lex Mercat.* b. 1, c. 81; *Bacon's Essays*, c. 41; *Cro. Jac.* 208; *Bynkersh. Quæst. Jur. Privat.* l. 8, c. 16.

(l) *Thomson v. Royal Exch. Ass. Co.*, 1 M. & S. 80.

(540) The questions which arise from the bottomry of a vessel are, in the United States, frequently settled in admiralty. 1 Pars. on Ship. & Adm. 182. A bottomry bond made by the master vests no absolute indefeasible interest in the ship on which it is founded, but gives a claim upon her which may be enforced with all the expedition and efficiency of the admiralty process. *Blains v. The Charles Carter*, 4 Cranch, 328. See *United States v. Delaware Ins. Co.*, 4 Wash. C. C. 418. Such bonds are not within the purview of a State statute requiring record of mortgages of personal property. *Fontaine v. Beers*, 19 Ala. 722; *The Brig Draco*, 2 Sumn. 157, 189.

The essential difference between a bottomry and a simple loan is stated to be, that in the latter the money is at the risk of the borrower, and must be paid at all events; in the former it is at the risk of the lender during the voyage, and the right to demand payment depends on the safe arrival of the vessel. *Greeley v. Waterhouse*, 19 Me. 9; *Jennings v. Ins. Co. of Penn.*, 4 Binn. 244; *Northwestern Ins. Co. v. Ferward*, 36 N. Y. (9 Tiff.) 139; *Bray v. Bates*, 9 Metc. (Mass.) 237; *Leland v. The Medora*, 2 Woodb. & M. 92, 107. The perils of the sea being at the risk of the lender gives the right of reserving any rate of interest agreed upon without incurring the penalties of usury. *The Atlantic*, 1 Newb. 514; *The Yuba*, 4 Blatch. C. C. 352; *The Mary*, 1 Paine, 671.

A valid bottomry bond may be made by the owner of a vessel either in a foreign or home port. *The Draco*, 2 Sumn. 157; *The Mary*, 1 Paine, 671. But the master can give such a bond only abroad and from necessity. See *The Lavinia v. Barclay*, 1 Wash. C. C. 49; *Hurry v. The John and Alice*, id. 293; *The Aurora*, 1 Wheat. 96; *Maitland v. The Atlantic*, 1 Newb. 514; *Joy v. Allen*, 2 Woodb. & M. 303; *The Packet*, 8 Mas. C. C. 255; *Murray v. Lazarus*, 1 Paine, 572.

only the borrower, personally, is bound to answer the contract; who therefore in this case is said to take up money at *respondentia* (*m*). (541) The general nature, accordingly, of a *respondentia* bond is this: the borrower binds himself [*210] in a penal sum, upon condition that the obligation shall be * void, if he pay the lender the sum borrowed and so much per month from the date of the bond till the ship arrives at a certain port, or if the ship be lost or captured in the course of the voyage. The *respondentia* interest is frequently at a high rate in proportion to the risk and profit of the voyage. Further, a lender upon *respondentia* is entitled to receive the whole sum advanced, provided the ship and cargo arrive at the port of destination; nor will he lose the benefit of the bond, if an accident happens by the default of the borrower or the captain of the ship. Neither will a temporary capture, or any damage short of the destruction of the ship, defeat his claim (*n*).

The terms "bottomry" and "*respondentia*," above used, are also applied to contracts for the repayment of borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; *ex. gr.*, when a man lends a merchant 1000*l.* to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such voyage be safely performed: which kind of agreement is sometimes called *fœnus nauticum*, and sometimes *usura maritima* (*o*).

A policy of insurance (*p*) is a contract between A. and B., that upon A.'s paying a premium equivalent to the hazard run, B. will indemnify or insure him against a particular event (*q*). This is founded upon one of the same principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. For, if I insure a ship to the Levant, and back again, at five *per cent.*; here I calculate the chance that she performs her voyage, to be twenty to one against her being lost: and, if she be lost, I lose [*211] 100*l.* and get 5*l.* Now, this is much the same * as if I lend the merchant, whose fortunes are embarked in this vessel, 100*l.* at the rate of eight *per cent.* For, by a loan I should be immediately out of possession of my money, the inconvenience of which we have supposed equal to three *per cent.*: if, therefore, I had actually lent him 100*l.* I must have added 3*l.* on the score of inconvenience, to the 5*l.* allowed for the hazard, which together would have made 8*l.* But as, upon an insurance, I am never out of possession of my money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard. (542)

(*m*) *Busk v. Fearon*, 4 East, 819.

(*n*) See *Thomson v. Royal Exch. Ass. Co.*, 1 M. & S. 80.

(*o*) Moll. de Jur. Mar. 361. Malyne, Lex Mercat. b. 1, c. 81.

(*p*) *Police d'assurances*, from *polliceri*, to

promise. So, a bill of lading is called in French *police de chargement*.

(*q*) The subject matter insured was peculiar in *Carter v. Boehm*, 5 Burr. 1905; *Wilson v. Jones*, L. R. 2 Ex. 159.

(541) See *Maitland v. The Atlantic*, 1 Newb. 514; S. C., 3 Am. Law. Reg. 477; 1 Pars. on Ship. & Adm. 165.

(542) A contract of insurance is an agreement by which one party, for a consideration, promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest. In fire insurance and marine insurance the thing insured is property; in life or accident insurance it is the life or health of a person. In either case neither the times and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement between them is a contract of insurance. All that is

To the time of queen Elizabeth is referable the first of our statutes (*r*) concerning marine insurance, its object having been to establish a special tribunal for the determination of cases connected therewith; or rather to confirm and extend the authority of one which the merchants of London had previously established. The special court thus erected for deciding questions on policies of insurance fell, however, on account of its defective jurisdiction, into disuse; it having been decided, that a judgment therein for the defendant did not protect him from a subsequent action for the same cause (*s*).

It must not, indeed, be supposed that maritime insurance originated with the statute of Elizabeth just cited, or was, even at the date of its passing, of recent existence here; on the contrary, the preamble of the act recites that it had been "time out of mind an usage amongst merchants, both of this realm, and of foreign nations;" the introduction of maritime insurance amongst us having been due * to the Lombards, who settled in London in the 13th century, and for a long time conducted, almost exclusively, the foreign trade of this country (*t*). (543)

The written contract (*u*) by which a ship, its cargo, or freight (*v*) may be

(*r*) 43 Eliz. c. 12.

(*s*) *Came v. Moya*, 2 Sid. 131. A subsequent parliamentary interference with this matter, was the granting of a monopoly of insuring, as against other companies, to the Royal Exchange and the London Assurance Companies, by the stat. 6 Geo. 1, c. 18, which was repealed by the 5 Geo. 4, c. 114; and marine assurances are now largely effected with public companies.

As to the mode in which assurances are transacted, through the medium of brokers, see *Stewart v. Aberdeen*, 4 M. & W. 211;

Jenkins v. Power, 6 M. & S. 269; *Xenos v. Wickham*, L. R. 2 H. L. Cas. 296.

(*t*) Mr. Duer observes, in the Introduction to his Treatise on Marine Insurance, p. 33, that the influence of the Italians over the commerce and commercial regulations of our ancestors is well known, and is attested, even at this day, by the reference in sea policies to the street which was distinguished by the name and residence of their countrymen.

(*u*) The contract of marine insurance is expressly required to be in writing by stat. 35 Geo. 3, c. 63, s. 11.

(*v*) See *De Vaux v. P Anson*, 7 Scott, 507.

requisite to constitute such a contract is the payment of the consideration by the one and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract. GRAY, J., in *Com. v. Wetherbee*, 105 Mass. 149, 160.

That a contract of insurance by parol is sufficient to bind the parties in the absence of any statute provision to the contrary, see *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278; *Sanford v. Trust Fire Ins. Co.*, 11 Paige, 547; *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Barr. (Penn.) 339; *Union Mut. Ins. Co. v. Commercial Mut. Ins. Co.*, 2 Curtis' C. C. 524; S. C. affirmed, 19 How. (U. S.) 318; *Rhodes v. Railway Passengers' Ins. Co.*, 5 Lans. 71; *Fried v. Royal Ins. Co.*, 50 N. Y. (5 Sick.) 243; *Ellis v. Albany Ins. Co.*, id. 402; *Henning v. U. S. Ins. Co.*, 2 Dill. (Mo.) 26; *Sanborn v. Firemen's Ins. Co.*, 16 Gray (Mass.), 448; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371. But see, *contra*, *Cockerell v. Cincinnati Mut. Ins. Co.*, 15 Ohio, 148. A verbal agreement to extend the terms of an existing policy, so that it shall cover property not originally within the scope of the contract, would also seem to be valid. See *Wood v. Rutland, etc.*, *Mut. Ins. Co.*, 81 Vt. 552.

Contracts of insurance, like all other contracts, are construed so as to give effect to the intent of the parties as indicated by the language employed. And the language employed must be taken in its ordinary popular sense, unless it appears to have been used in a technical sense, or custom or usage has impressed a different meaning upon it. See *Mutual Safety Ins. Co. v. Home*, 2 N. Y. (2 Comst.) 235; *Whiton v. Old Colony Ins. Co.*, 2 Metc. (Mass.) 1; *Springfield Fire & Marine Ins. Co.*, 48 N. Y. (4 Hand) 389; S. C., 3 Am. Rep. 711; *Savage v. Howard Ins. Co.*, 52 N. Y. (7 Sick.) 502.

(543) See 1 Pars. on Mar. Ins. 10 *et seq.*

insured, is called a policy of insurance (*x*)—an open policy, where the value of the thing insured is not inserted in it, but in case of loss is to be proved—a valued policy where the value is settled by agreement between the parties (*y*), viz., the assured and the underwriters; though, even in this case, if the loss be partial, the amount must be proved; and if the goods insured are fraudulently overvalued, to cheat the insurers, the contract is thereby entirely vitiated, and nothing can be recovered upon it (*z*).

The policy must contain the name or names of one or more of the persons interested, or of the consignor or consignee of the property, or of the person or persons residing in Great Britain, who shall receive the order for and effect the insurance, or of the person or persons who shall give the order to the agent employed to effect the same (*a*). It has, however, recently been enacted (*b*), that wherever a policy on any ship, goods, or freight has been assigned (*c*), so as to pass the beneficial interest therein to any person entitled to the property [* 213] thereby * insured, the assignee of such policy shall be entitled to sue thereon in his own name; the defendant in such action being entitled to make any defence which he might have made if it had been brought in the name of the person by whom or for whose account the policy sued upon was effected.

The wording of a sea policy of insurance is peculiar; but the mercantile world have long been used to it, and every material portion of it has been diligently scanned by lawyers, and been illustrated by the decisions of our courts. It is to be construed according to the same rules as other written contracts, and by reference to the intention of the parties, which must be gathered from the words of the instrument and the surrounding circumstances. If the words of the instrument are clear in themselves, the instrument must be construed accordingly; but if its words are susceptible of more meanings than one, the judge must inform himself of their true significance by the aid of the jury and the surrounding circumstances which bear upon the contract (*d*).

The person underwriting a sea policy is guided in so doing by these considerations. He calculates and estimates, as best he may, the price at which he may safely indemnify the trader, proposing to insure, against risks, regard being had to the nature of the voyage to be performed, and the usual course and manner of making it. He takes the risk upon the supposition that whatever is usual or necessary will be done. And if the risk is varied, or the voyage is altered, by the fault of the owner or master of the ship, the insurer ceases to be liable. (544)

Marine insurance is thus essentially a contract of indemnity against the perils of the voyage enumerated in the policy (*e*); the dangers usually insured

(*x*) See its ordinary form, Arnould, Mar. Insur. 3rd ed. 220. As to the stamp on the policy, see Smith, Merc. Law, 7th ed. 867.

(*y*) Smith, Merc. Law, 7th ed., 844; *Irving v. Manning*, 1 H. L. Cas. 287; *Barker v. Janson*, L. R. 3 C. P. 308; *Wilson v. Nelson*, 5 B. & S. 854.

(*z*) *Haigh v. De la Cour*, 3 Camp. 319.

(*a*) Stat. 28 Geo. 3, c. 56, s. 1.

(*b*) 31 & 32 Vict. c. 86, s. 1.

(*c*) As by indorsement of the policy. *Id.* s. 2.

(*d*) *Carr v. Montefiore*, 5 B. & S. 408, 428.

(*e*) Which must set forth the premium, the amount insured, the risks insured against, and the names of the underwriters. 35 Geo. 3, c. 63, s. 11. See, also, 54 Geo. 3, c. 144.

(544) If the vessel departs voluntarily, and without necessity, from the usual course of the voyage, the insurer is discharged; but a deviation to save life will not avoid the policy. *Crocker v. Jackson*, 1 Sprague, 141; *George v. Nicholas*, Newb. 449, 452. And see *Turner v. Protection Ins. Co.*, 25 Me. 515; *Waleh v. Homer*, 10 Mo. 6.

against, being "of the seas, men of war, fire, enemies, pirates, rovers, thieves, * jettisons (*f*), letters of mart and countermart, surprisals, takings [* 214] at sea, arrests, restraints, and detentions of all kings, princes, and people of what nation, condition, or quality soever, barratry (*g*) of the master and mariners, and all other perils (*h*), losses, and misfortunes." (545)

Now, supposing a loss, whether of ship, cargo, or freight, to have occurred, it may, regard being had to the above words, sometimes be matter of contention whether the loss resulted from a peril insured against, or whether in respect of it, the underwriters are exempt from liability (*i*). And although difficulty may be felt in satisfactorily discriminating between particular cases and peculiar states of facts, and although it be impossible to draw any precise line upon this subject, the general rule is, that where mischief arises from perils of the seas, and the natural and almost inevitable consequence of that mischief is to create further mischievous results, the underwriters will be responsible for the further mischief and damage so occasioned. The relation of cause and effect cannot, indeed, always be accurately ascertained; yet if, in the ordinary course of events, a certain result usually follows from a given cause, the immediate relation of one of these to the other may, for practical purposes, be held to be established, and the *causa causans* may thus be singled out (*k*). (546)

(*f*) "Jettison" is a voluntary throwing overboard of goods in case of distress, or to save them from capture. *Butler v. Wildman*, 3 B. & Ald. 398.

(*g*) Generally speaking, "barratry" comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured.

The meaning of this word was much discussed in *Grill v. General Iron Screw Co.*, L. R. 3 C. P. 476; 1 C. P. 600.

(*h*) As to what perils are comprised in the general words "other perils," see *Phillips v.*

Barber, 5 B. & Ald. 161; *Cullen v. Butler*, 5 M. & S. 461; *Taylor v. Dunbar*, L. R. 4 C. P. 206.

(*i*) See, for instance, *Montoy v. London Ass. Co.*, 6 Exch. 451, where a vessel laden with hides and tobacco, in the course of her voyage, shipped seawater, which damaged the hides and affected the flavour of the tobacco. This damage was held to have been caused by perils of the seas.

(*k*) See, *ex. gr.*, *Ionides v. Univ. Mar. Ins. Co.*, 14 C. B. N. S. 259.

(545) This clause has been modified in form in most of the American policies, and some changes have been made in the substance. Perils of the sea, fire, barratry, theft, piracy, capture, arrests, and detentions, are the perils usually enumerated in American policies. The phrase "perils of the sea" is held to cover all losses or damages which arise from the extraordinary action of the wind and sea, and from inevitable accidents directly connected with navigation, excepting those provided for in other parts of the policy, as capture and the like. See 1 Pars. on Mar. Ins. 544; *Schieffelin v. New York Ins. Co.*, 9 Johns. 21; *Martin v. Salem Mar. Ins. Co.*, 2 Mass. 420; *Hazard v. New England Mar. Ins. Co.*, 1 Sumn. 218. Barratry is one of the usual marine risks, and is covered by a policy which does not state explicitly the perils insured against. *Parkhurst v. Gloucester, etc., Ins. Co.*, 100 Mass. 301; S. C., 1 Am. Rep. 105. As to the meaning of the term barratry, see *Atkinson v. Great West. Ins. Co.*, 4 Daly, 1; S. C., 5 Alb. Law Jour. 252; *Wilson v. General M. Ins. Co.*, 12 Cush. (Mass.) 380. Ignorance or inattention of the master or mariners is not one of the perils of the sea. *Lodwicks v. Ohio Ins. Co.*, 5 Ohio, 433; *Moses v. Sun Mut. Ins. Co.*, 1 Duer, 159; S. C., 11 N. Y. Leg. Obs. 78; *Monongahela Ins. Co. v. Chester*, 43 Penn. St. 491. The warranty against capture has been held to include capture by a confederate cruiser during the rebellion. *Swinnerton v. Col. Ins. Co.*, 37 N. Y. (10 Tiff.) 174; *Mauran v. Ins. Co.*, 6 Wall. 1; *Dole v. N. E. M. M. Ins. Co.*, 51 Me. 465; *Same v. Same*, 6 Allen (Mass.), 378.

(546) It is a settled rule that the peril, whatever it may be, upon which the policy attaches must be the proximate, and not the remote cause of the loss. 8 Kent's Com. 302. For illustrations of the application of the rule, see *Dyer v. Piscataqua F. & M. Ins. Co.*, 53 Me. 118; *Woodruff v. Commercial M. Ins. Co.*, 2 Hilt. 122.

[* 215] * Again, by the terms of the policy, the underwriters are usually made liable for salvage and for general average.

The term "salvage" is used to signify either what may be recovered from a wreck, or, as here, the compensation allowed to those persons by whose assistance a ship or cargo is saved from danger or loss in case of wreck, capture, or the like (l).

General average (originally the proportion of cattle-labour due from each tenant to his lord, from *averare*, to carry or draw, and afterwards used to signify the proportion paid by each merchant for his goods carried (m)), is a contribution by the owners of the ship, freight, and goods on board, in proportion to their respective interests, towards any particular loss or expense sustained for the general safety of the ship and cargo, in order that the particular sufferer may not in the end be a greater loser than the rest of the persons interested. Thus, in the case of jettison (n), or of cutting away the ship's masts in a storm, or where salvage is paid to recaptors, or goods are given as a compensation to pirates to save the rest, or an expense is incurred in reclaiming the ship, or defending a suit in a foreign court of admiralty, and obtaining her discharge from an unjust capture or detention:—in these and the like cases, where any sacrifice is deliberately and voluntarily made, or any expense is fairly and *bond fide* incurred to prevent a total loss, or some great disaster, such sacrifice or expense is regarded as the proper subject of a general contribution, and is to be rateably borne by the owners of the ship, freight, and cargo, so that the loss may fall equally upon all, according to the maxim of the civil law, *nemo debet locupletari aliend jactura*. The application of this principle was understood by the Rhodians, whose regulations on the subject were adopted into the * Roman law, and made an important head in [* 216] the Digest (o). The claim to general average does not arise, unless the loss was voluntarily incurred by those on board, or having the conduct of the business, and tended to, and was actually followed by, the preservation of the rest, or of some part of the ship and cargo (p).

Petty or accustomed averages are such small charges as pilotage, towage, light money, beaconage, anchorage, quarantine, &c., which, when they are incurred in the ordinary course of the voyage, are regarded as necessary and ordinary expenses, and not as a loss within the terms of the policy; but if incurred for any extraordinary purpose in the voyage, as to provide against an impending danger, or in consequence of the ship's being driven out of her course by stress of weather, are deemed general average, for which the insurer will be liable (q). (547)

(l) Maud. & Poll. Merch. Shipp., 2nd ed. 419. The claim to and mode of estimating salvage are now mainly regulated by stat. 17 & 18 Vict. c. 104, ss. 458, *et seq.*

(m) Cowell, Law Dict. *ad verb.*

(n) See *Müller v. Tetherington*, 6 H. & N. 278.

(o) Under the title *De lege Rhodi de jactu*.

(p) Marshall, Insur. 539.

As to the mode of estimating the amount

of contribution in respect of general salvage, and liability for it, see *Fletcher v. Alexander*, L. R. 8 C. P. 375; *Dickenson v. Jardine*, *Id.* 689.

(q) As to "particular average," and "particular charges," see *Kidston v. Empire Mar. Ins. Co.*, L. R. 2 C. P. 357; *Booth v. Gair*, 15 C. B. N. S. 291; *Oppenheim v. Fry*, 5 B. & S. 848.

(547) In the United States, partial loss and average are understood by commercial men to mean the same thing, and average other than general includes every loss for which the underwriter is liable, except general average and total loss, which last includes total loss with salvage. *Wadsworth v. Pacific Ins. Co.*, 4 Wend. 33. See *Wallerstein v. Columbian*

Such being in brief the liabilities cast upon the underwriter of a marine policy in the ordinary form, he engages within such limits, and to the extent of its real or agreed value, that the ship or cargo insured shall arrive safely at its destination, and undertakes, on the happening of a certain contingency, to make good the loss. Such loss may be partial or total, there being three classes of cases in which total loss may occur: the first is where the ship absolutely sinks, and is, in fact, lost; the second, where the ship itself may not be, in fact, totally lost, but may be unable to continue her voyage, being injured past repair; and the third, where the ship can be repaired, but the expense of repair will be so considerable, that after the repairs have been effected the vessel will fetch less in the * market than the sum expended in repairing [* 217] her; (548) a case falling within this last class is one of what is termed constructive total loss, and there notice of abandonment should be given by the insured (r). Where, moreover, the subject-matter of the insurance is not actually annihilated, the assured claiming as for a total loss must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it (s).

A policy of marine insurance may contain express, or may give rise to implied warranties, non-fulfilment of which by the assured will discharge the underwriter from liability; a warranty differing from a representation *dehors* the policy in this respect, that it must be strictly complied with. A warranty is a condition or contingency; unless it be performed there is no contract. Nor does it signify for what purpose the warranty was introduced, for being introduced the contract does not exist unless it is literally complied with (t). A collateral representation, if false in a material point, may indeed avoid the

(r) *Arg. Irving v. Manning*, 1 H. L. Cas. 290; *Fleming v. Smith*, *id.* 518; *Stewart v. Greenock Mar. Ins. Co.*, 2 H. L. Cas. 159, 183; *King v. England*, 3 H. & C. 209. *ship, Kemp v. Halliday*, 6 B. & S. 723; *King v. Walker*, 3 H. & C. 209; *Grainger v. Martin*, 4 B. & S. 9;—of goods, *Furnworth v. Hyde*, L. R. 2 C. P. 204;—of freight, *Kidston v. Empire Mar. Ins. Co.*, L. R. 2 C. P. 357. See as to a constructive total loss of the (t) *Carter v. Boehm*, 3 Burr. 1905.

Ins. Co., 44 N.Y. (5 Hand) 204; S. C., 4 Am. Rep. 664; *Insurance Co. v. Bland*, 9 Dana (Ky.), 147. General average is incurred where the expenses or losses arise in a case of emergency not produced by the misconduct or unskillfulness of the master, and not resulting from the ordinary circumstances of the voyage. *Ross v. Ship Active*, 2 Wash. C. C. 226 See *Williams v. Suffolk Ins. Co.*, 3 Sumn. 518; *Spafford v. Dodge*, 14 Mass. 74; *Sims v. Gurney*, 4 Binn. (Penn.) 524; *Fowler v. Ruthbones*, 12 Wall. (U. S.) 102; *Bales of Cotton*, 8 Blatchf. 221; *The Milwaukee Belle*, 22 Biss. 197; *The Congress*, 1 *id.* 42.

(548) If the expenses of repair will exceed half the value of the ship when repaired she is considered a total loss, according to the American authorities, and may be abandoned. *Wood v. Lincoln & Kennebec Ins. Co.*, 6 Mass. 479; *Allen v. Commercial Ins. Co.*, 1 Gray (Mass.), 154; *Coolidge v. Gloucester Mar. Ins. Co.*, 15 Mass. 841; *Fiedler v. New York Ins. Co.*, 6 Duer, 282; *Wallerstein v. Col. Ins. Co.*, 44 N. Y. (5 Hand) 204, 217; S. C., 4 Am. Rep. 664; *McColl v. Sun Mut. Ins. Co.*, 2 Jones & Sp. 313, 320.

Owners of merchandise insured against perils of the seas, "free of particular average only," are entitled to recover as for a total loss, although some portion of the goods may be brought into port in *specie*, if the right to abandon is exercised during the continuance of the peril, and there is a total loss of value to the owner. Total loss is not necessary. *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. (5 Hand) 204; S. C., 4 Am. Rep. 664. See, generally, *Williams v. Kennebec Mut. Ins. Co.*, 31 Me. 455; *Lord v. Neptune Ins. Co.*, 10 Gray (Mass.), 109; *Ridyard v. Phillips*, 4 Blatchf. 443; *Depeyster v. Sun Mut. Ins. Co.*, 17 Barb 306; *Bryan v. New York Ins. Co.*, 25 Wend. 617.

policy; if in a point immaterial, it can rarely suffice to evidence fraud, and will not in the absence of fraud vitiate the policy (*u*).

As showing the nature of an implied warranty, the following instance must suffice: a voyage policy may be effected on a ship prior to her leaving port, or when actually at sea, and in it there is contained an implied warranty that the ship is seaworthy at the commencement of the voyage; or in port, when preparing for it, or that * she had been seaworthy for the voyage when it commenced, if the insurance were on a vessel then at sea, that is to say, there is in such case a warranty to seaworthiness at the commencement of the risk (*x*). (549) The ground on which the implication of a warranty of seaworthiness rests is this. The insurer is entitled to expect that the ship-owner will do all that it behoves a careful and conscientious man to do to secure the safety of the crew who are to navigate the vessel, and of the merchant's goods which are to be conveyed in it, so that the risk covered by the insurance shall be limited to those perils incidental to navigation, against which the care and skill of man cannot provide. This doctrine is, however, flexible, and capable of accommodating itself to particular states of facts, so that if an insurer, with full knowledge of facts, agrees to insure a vessel incapable from her size or construction of being brought up to the ordinary standard of seaworthiness, the implied warranty will be taken to be limited to the capacity of the vessel, and will be satisfied if she is made as seaworthy as she is capable of being made (*y*).

A policy of insurance, as we have seen (*z*), is a contract of indemnity, subject to this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages (*a*). Such an insurance is essentially a speculative contract. The special facts upon which the contingent chances are to be computed lie most commonly within the knowledge of the assured only; the underwriter trusts to his representation, and proceeds in confidence that the assured does not keep any circumstance within his knowledge to mislead the underwriter into a belief that the circumstance does * not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, which

(*u*) *M'Dowell v. Fraser*, Dougl. 247; *De Hahn v. Hartley*, 1 T. R. 843. ed to attach. *Gibson v. Small*, 4 H. L. Cas. 353.

(*x*) By the law of England, in a time policy effected on a ship then at sea, there is no implied condition that the ship should be seaworthy on the day when the policy is intended

(*y*) *Burges v. Wickham*, 3 B. & S. 669.

(*z*) *Ante*, pp. 212, 213.

(*a*) *Irving v. Manning*, 1 H. L. Cas. 307.

(549) For an elaborate discussion of the question of the implied warranty of seaworthiness in time policies, see 1 Pars. on Mar. Ins. 389 *et seq.* The American rule is stated to be, that a warranty of seaworthiness, at the time of the ship's sailing, is implied when insurance by a time policy is made on a vessel then in her home port; but in a time policy, taken on a vessel "lost or not lost," then in a distant ocean, seaworthiness at the moment of effecting the insurance cannot be implied. *Rouse v. Insurance Co.*, 3 Wall. Jr. 367. And see *Jones v. Insurance Co.*, id. 278; *Capen v. Wash. Mut. Ins. Co.*, 12 Cush. (Mass.) 517.

The question as to whether a vessel is seaworthy is ordinarily one of fact to be determined by the jury. *Myers v. Girard Ins. Co.*, 26 Penn. St. 192; *Walsh v. Washington M. Ins. Co.*, 32 N. Y. (5 Tiff.) 427; *Hathaway v. Sun Mut. Ins. Co.*, 8 Bosw. 33; *Field v. Ins. Co. of N. A.*, 3 Md. 244. A ship is held to be seaworthy if, before setting out on a voyage, it is fit, in the degree which a prudent owner uninsured would require, to meet the perils of the service it is then engaged in, and would continue so during the voyage, unless it met with extraordinary damage. *Hozie v. Pacific M. Ins. Co.*, 7 Allen (Mass.), 211.

vitiates the policy. Nay, even though the suppression should happen through mistake, without any fraudulent intention, still the underwriter is deceived, and the policy may be avoided, the reason being that the risk in such case run is really different from the risk understood and intended to be run at the time of the agreement. And the policy would equally be void as against the underwriter if he concealed, as if he insured a ship on her voyage which he privately knew to have arrived, in which case an action would lie against him to recover back the premium (b).

No proposition, it has been judicially remarked, is better established than this, viz., that the party proposing the insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he is to guarantee the assured; (550) if, indeed, matters are common to the knowledge of both parties, such matters need not be communicated; and when a fact is one of public notoriety, as of war, or where it is one which is matter of inference, and the materials for informing the judgment of the underwriter are common to both, the party proposing the insurance is not bound to communicate that which he is fully warranted in assuming the underwriter already knows. Short of this, however, the party proposing the insurance is bound to make known to the insurer whatever is necessary and essential to enable him to determine what is the extent of the risk against which he undertakes to insure. Though, if the insurer choose to neglect the information which he receives, it is his own fault, provided sufficient information, so far as the assured is concerned, has been placed at his disposal (c).

The inducements to fraud on the part of the assured were to some extent diminished by the stat. 19 Geo. 2, c. 37, before the passing of [220] which a practice had obtained of insuring large sums without having any property on board, which were called insurances, "interest or no interest;" this was a species of gaming, without any advantage to commerce, such policies being denominated wagering policies: it was therefore enacted by sec. 1 of the above statute that all insurances, interest or no interest, or without further proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer, shall (with certain exceptions) be totally null and void; but this provision does not extend to foreign ships. Reinsurances which were prohibited by a repealed (d) section of the above statute are now legal (e).

A policy of insurance against loss by fire is a contract of indemnity within the statute 14 Geo. 3, c. 48 (f), by which the company insuring undertakes to make good the loss by a money payment not exceeding the amount insured, or (in general) to reinstate the premises which have sustained damage. Upon the construction of this instrument, the form of which varies, difficult questions may arise (g); the principles which govern

(b) *Carter v. Boehm*, 8 Barr. 1905; *Russell v. Thornton*, 6 H. & N. 104; *Holland v. Russell*, 4 B. & S. 14.

(c) *Bates v. Hewitt*, L. R. 2 Q. B. 595, 604-5.

(d) See 30 & 31 Vict. c. 59.

(e) 27 & 28 Vict. c. 56, s. 1.

(f) *Post*, p. 221.

(g) See, for instance, *Elliott v. Royal Exch. Ass. Co.*, L. R. 2 Ex. 237.

(550) See *Ely v. Hallett*, 2 Caines, 57; *Hoyt v. Gilman*, 8 Mass. 386; *Kohne v. Ins. Co. of N. America*, 6 Binn. (Penn.) 219; *Clement v. Phenix Ins. Co.*, 6 Blatchf. 481; *Walden v. New York Firemen Ins. Co.*, 12 Johns. 128; S. C., id. 518; *Folsom v. Mercantile, etc., Ins. Co.*, 8 Blatchf. 170.

it, however, are very simple: any material misdescription of the premises insured, or fraud on the part of the assured, avoids the policy, any condition contained therein, performance of which by the assured is precedent to his right to claim under the policy, must be performed (*h*), and damage proximate to the peril insured against is alone recoverable (*i*).

[* 221] * Life insurance is made available for effecting any of various useful objects, such as making a settlement upon marriage or afterwards insuring a provision for wife and children. So, too, in the case

Life Insurance. of a loan, if the chance of re-payment depends upon the borrower's life, it is usual (besides the ordinary rate of interest) for the borrower to have his life insured till the time of re-payment; for which he is loaded with an additional premium, suited to his age and constitution. Thus, if Sempronius has only an annuity for his life, and would borrow 100*l.* of Titius for a year; the inconvenience and general hazard of this loan, we have seen (*k*), are equivalent to 5*l.*, which might, therefore, be the rate of interest: but there is also a special hazard in this case; for if Sempronius dies within the year, Titius may lose the whole of his 100*l.* Suppose this chance to be as one to ten: it will follow that the extraordinary hazard is worth 10*l.* more, and therefore that the reasonable rate of interest in this case would be fifteen *per cent.* Sempronius, therefore, gives Titius, the lender, 5*l.* by way of interest, and applies to an insurance company to indemnify Titius against the extraordinary hazard incurred, paying them the other 10*l.* *per annum* for so doing. And in this manner may any particular hazard be provided against. But, in order to prevent these insurances from being turned into a mischievous kind of gaming, it was enacted by the statute 14 Geo. 3, c. 48 (*l*), that no insurance shall be made on any life wherein the party insured has no interest; that in all policies the name of such interested party shall be inserted; and that nothing more shall be recovered thereon than the amount of the interest of the insured (*m*). (551)

(*h*) *Mason v. Harvey*, 8 Exch. 819.

(*i*) *Morden v. City and County Ass. Co.*, L. R. 1 C. P. 232; *Everett v. London Assur. Co.*, 19 C. B. N. S. 126; *Stanley v. Western Insur. Co.*, L. R. 8 Ex. 71.

(*k*) *Ante*, p. 208.

(*l*) Ss. 1—3.

(*m*) Every individual has an insurable in-

terest in his own life. It has, however, been held that a father has not an insurable interest in the life of his child (*Hatford v. Kymer*, 10 B. & Cr. 72); though it seems that a wife has such an interest in the life of her husband (*Read v. Royal Exch. Ass. Co.*, Peake, Add. C. 70).

(551) A person has an insurable interest in his own life (*Provident Life Ins. Co. & Inv. Co. v. Baum*, 29 Ind. 286; *Campbell v. New England M. L. Ins. Co.*, 98 Mass. 381); a father in the life of his minor son (*Loomis v. Eagle Life & H. Ins. Co.*, 6 Gray [Mass.], 396. See *Mitchell v. Union L. Ins. Co.*, 45 Me. 104); or a sister in the life of a brother on whom she depends for support. *Lord v. Dall*, 12 Mass. 115. So, a woman engaged to be married to a man has an insurable interest in his life (*Chisholm v. National, etc., Life Ins. Co.*, 52 Mo. 213); and a wife has an insurable interest in the life of her husband. *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. (4 Hand) 283; *Thompson v. American Tontine L. & S. Ins. Co.*, 46 N. Y. (1 Sick.) 674. In regard to the interest required to support a policy, the American law is less rigid than the English law; and the more recent American decisions sustain the doctrine, that a person has an insurable interest in the life of another when there is a reasonable probability that he will gain by the latter's remaining alive or lose by his death. See *Id.*; *Hoyt v. N. Y. L. Ins. Co.*, 8 Bosw. 440; *Miller v. Eagle Life & H. Ins. Co.*, 2 E. D. Smith, 268; 31 *less on Life Ins.*, § 21; 8 Kent's Com. (12th ed.) 369, n. 1.

Where the usual condition against suicide or death, by the party's own hand, is inserted in the policy, the prevailing doctrine is, that if the party kills himself voluntarily, knowing

* As well policies of insurance against fire as those against sea risks [* 222] are properly contracts of indemnity, the insurer engaging to make good within certain limited amounts losses sustained by the assured in their buildings, ships, and goods. The contract of life assurance differs however from the two preceding contracts in this respect, that it is a mere contract to pay a sum of money on the death of a person in consideration of a certain sum paid down, or of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life, and when once fixed being constant and invariable. This species of insurance, although formerly regarded as a contract of indemnity (o), is not really such (p).

It has recently been enacted that any person or corporation entitled by assignment or other derivative title to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge to the assurance company liable on such policy, may sue for the moneys secured by * it (q), a written notice of the assignment [* 223] having been duly given (r).

The extent of security afforded by a life policy varies in accordance with the form adopted by the office which insures and the exceptions inserted in it (s). Such a policy being founded upon the answers given by the assured to questions concerning his health proposed to him, will be avoided by any misrepresentation on his part, or by the wilful suppression of a material fact. The distinction formerly adverted to being here again noticeable between a warranty which, whether material or immaterial, must be adhered to, and a representation which, unless material and fraudulent, cannot *per se* affect the right of the assured to recover upon the policy (t). As a general rule, how-

(o) *Godsall v. Boldero*, 9 East, 72. There, an insurance for a certain term had been effected on the life of Mr. Pitt by a tradesman to whom he was indebted. Mr. Pitt died insolvent before the term of insurance had expired. A grant of money was made by parliament to defray his debts, and out of this grant the plaintiff's claim was liquidated. It was held that the insured could not recover upon the policy. "This action," said Lord Ellenborough, "is, in point of law, founded upon a supposed damnification of the plaintiff occasioned by the death of the assured existing and continuing to exist at the time of action brought; and being so founded, it follows, of course, that if before the action was brought, the damage which was at first supposed likely to result to the creditor from the death were wholly obviated and prevented by payment of the debt, the foundation of any action on the part of the assured against the insurer falls."

(p) *Dalby v. India and London Life Ass. Co.*, 15 C. B. 365. There the action was brought upon a policy of assurance effected on the life of the late Duke of Cambridge. The interest of the assured in the policy had ceased before the death of the duke, so that there was nothing in respect of which he could claim to be indemnified; the action nevertheless was held to be maintainable.

(q) 30 & 31 Vict. c. 144, s. 1. This act does not apply to assurances, &c., granted under the 16 & 17 Vict. c. 45, or 27 & 28 Vict. c. 43; or to any engagement for payment on death by a friendly society.

(r) 30 & 31 Vict. c. 144, s. 8.

(s) As to the exception in case of suicide, see *Borradaile v. Hunter*, 5 M. & Gr. 639; *Clift v. Schwabe*, 3 C. B. 437; in case of accident, see *Fitton v. Accidental Death Ins. Co.*, 17 C. B. N. S. 123.

(t) *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, 503-4; Broom, Leg. Max. 4th ed. 757-8, and cases there cited.

the nature and effect of the act which he does, and intending the consequence, the policy is avoided, although he is insane at the time. See *Dean v. American Mut. Life Ins. Co.*, 4 Allen (Mass.), 96; *Cooper v. Mass. Mut. Life Ins. Co.*, 102 Mass. 237; S. C., 3 Am. Rep. 451; *Nimick v. Mut. Ben. Life Ins. Co.*, 3 Brewst. 502. See, also, *St. Louis M. L. Ins. Co. v. Graves*, 6 Bush (Ky.), 268; *Easterbrook v. Union Mut. Life Ins. Co.*, 54 Me. 224; *Life Ins. Co. v. Terry*, 15 Wall. (U. S.) 180. A policy is also usually conditioned to be void in case the insured shall die by the hands of justice or in the known violation of law. See *Overton v. St. Louis Mut. Life Ins. Co.*, 39 Mo. 122; *Cluff v. Mut. Benefit L. Ins. Co.*, 13 Allen (Mass.), 306; *Bradley v. Mut. Benefit L. Ins. Co.*, 45 N. Y. (6 Hand) 422; S. C., 6 Am. Rep. 115.

ever, with the statement of which this division of our subject will conclude, "In all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured" (u).

III. Contracts not falling within either of the two preceding classes are in the next place to be considered; such, I mean, as are not required to be in writing by statute, nor are so in virtue of custom and usage prevalent amongst merchants. Contracts referable to this class are of course infinitely various, but a few of them only can properly here be noticed. We shall speak of the contract of bailment generally, contracts with carriers of goods and passengers, and shall incidentally mention [* 224] some other * kinds of contracts and agreements about which specific knowledge should be had.

1. Bailment. Bailment, from the French word *bailler*, to deliver, is a delivery of a thing in trust for some special object or purpose, and upon an undertaking express or implied to conform to the object or purpose of the trust; as if cloth be delivered, or (in our legal dialect) bailed, to a tailor to make a suit of clothes, he has it upon an implied contract to render it again when made, and that in a workmanlike manner. If goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to carry them to the person appointed. If goods be delivered by a guest to an inn-keeper, the inn-keeper is bound to keep them safely, and restore them when his guest leaves the house. If a man takes in cattle to graze and depasture on his land, which the law calls agistment, he takes them upon an implied contract to return them on demand to the owner. If a pawnbroker receives plate or jewels as a pledge, or security, for the re-payment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them. If a landlord distrains goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distrainor, who is bound by an implied contract in law to restore them on payment of the debt and expenses before the time of sale; or, when sold, to render back the overplus. If a man delivers anything to his friend to keep for him, the receiver is bound to restore it on demand. If a man hires or borrows a horse for a month, he has the possession and a qualified property therein during that period; on the expiration of which his qualified property determines, and the owner becomes (in case of hiring) entitled to the possession of the horse and also to the price for which the horse was hired.

In each of these instances there is a special qualified property in the thing [* 225] bailed transferred from the bailor to * the bailee, together with the possession. It is not an absolute property, because of the bailee's contract for restitution: the bailor having still left in him the right to a chose in action, grounded upon such contract. And, on account of this qualified property of the bailee in the thing bailed, he (as well as the bailor) may maintain an action against one who injures or takes away such a chattel. The tailor, the carrier, the inn-keeper, the agisting farmer, the pawnbroker, the distrainor, and the general bailee, may each of them vindicate, in his own

(u) *Lindenau v. Desborough*, 8 B. & C. 536, 592.

right, this his possessory interest, against a stranger or third person. For, being responsible to the bailor, if the goods are lost or damaged by his default, or if he do not deliver up the chattel on lawful demand, it is therefore reasonable that he (the bailee) should have a right of action against any other person who may have purloined or injured them, in order that he may always be ready to answer the call of the bailor (x).

According to Lord Holt (y) there are six sorts of bailments:—(1) A bare naked bailment of goods, delivered by one man to another, to keep for the use of the bailor; this was called by the civilians *depositum* (z). (2) When goods or chattels are lent to a friend *gratis*, to be used by him, and this is called *commodatum*, because the thing is to be restored *in specie*. (3) When goods are left with the bailee, to be used by him for hire, this is called *locatio et conductio*, the lender being the *locator*, and the borrower the *conductor*. (4) When goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor, and this is called *vadium*, a pawn, or pledge. (5) *Locatio operis faciendi*, when goods or chattels are delivered to be carried, or something is to be done about them for a reward, to be paid by the person who delivers them to the bailee, who is to do the * thing [* 226] about them. (6) *Mandatum*, when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them *gratis*, without any reward for such his work or carriage.

The above celebrated classification of bailments has been much criticised and found fault with, and for practical purposes may be greatly simplified. Inasmuch, however, as the liability of a bailee must be determined by reference to the degree of care which he has exercised in regard to the subject-matter of the bailment, a tolerably precise meaning should at once be assigned to certain terms which are used in treating of the law of bailment.

Let us designate the degrees of diligence as slight, ordinary, and extraordinary, the degrees of negligence corresponding thereto will then be respectively gross, ordinary, and slight. (552) Common or ordinary diligence being defined as that degree of diligence which men in general exert in respect to their own affairs—that common prudence which men of business and heads of families usually exhibit in conducting matters which interest them (a), less than this degree of care will constitute slight, and more than this will constitute extraordinary diligence; and the corresponding degrees of negligence will therefore be known or ascertainable. Gross negligence will, according to this

(x) See *Rooth v. Wilson*, 1 B. & Ald. 59.

(y) *Coggs v. Bernard*, Ld. Raym. 909.

(z) See *Southcote's Case*, 4 Rep. 83.

(a) Sir W. Jones, *Bailments*, 6; Story, *Bailments*, 5th ed. 15—18.

(552) The theory that there are three degrees of negligence described by the terms, slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. CURTIS, J., in *Steamboat New World v. King*, 16 How. (U. S.) 474. And see *Perkins v. N. Y. C. R. R.*, 24 N. Y. (10 Smith) 196, 207; *Storer v. Gowen*, 18 Me. 177; *Briggs v. Taylor*, 28 Vt. 185; *Foster v. Essex Bank*, 17 Mass. 479; *Tracy v. Wood*, 3 Mason, 182.

scale, be negligence greater than that evidenced by the absence of ordinary care—of that degree of care which a man possessed of common prudence ought to take; and, after a similar fashion, the meaning of slight negligence may be made apparent.

Regard being had to the preceding paragraph, three leading classes of bailments may be thus characterized:—

1st. Where the trust is exclusively for the benefit of the bailor (*b*). Here slight diligence only in regard to the thing bailed is required from the bailee, [* 227] unless he be possessed of special skill or knowledge in relation to * it (*c*); and gross negligence alone will, except in the case of a skilled bailee, entail liability. (553)

2ndly. Where the trust is exclusively for the benefit of the bailee. Here extraordinary care in regard to the chattel bailed is required from the bailee, who may even be liable for the negligence of his servant, without any consideration of personal negligence in hiring or keeping him. If the bailee of a horse, which has been gratuitously lent him, put it in his stable, and the horse be stolen, the bailee shall not be answerable. But if he or his servant leave the stable door open, and a thief steals the horse, the bailee will be chargeable by reason of his neglect and laches (*d*). (554)

3rdly. Where the trust is for the mutual benefit of both parties to the bailment; (555) and here the degree of care and diligence required from the bailee is intermediate between slight and extraordinary. This is by far the most important class of bailments, and in connexion with it must be noticed the doctrine of our law respecting lien.

Lien is a right, exerciseable in given cases over the chattel property of another, to retain such chattel until some charge attaching to and in respect of it has been satisfied (*e*).

(*b*) *Coggs v. Bernard*, Ld. Raym. 909.

(*c*) *Wilson v. Brett*, 11 M. & W. 113.

(*d*) Ld. Raym. 916; *Dansey v. Richardson*, 3 E. & B. 144.

(*e*) Cross on Lien, 2.

(553) See *Spooner v. Mattoon*, 40 Vt. 300; *McKay v. Hamblin*, 40 Miss. 473; *Dunn v. Branner*, 13 La. Ann. 452; *Sodowsky v. McFarland*, 8 Dana (Ky.), 205. A mere depository is not liable to an action until refusal to deliver up on demand. *Duncan v. Magette*, 25 Tex. 245; *Nelson v. King*, id. 655; *Jackman v. Partridge*, 31 Vt. 558; *Phelps v. Bostwick*, 22 Barb. 314; *Hill v. Wiggins*, 81 N. H. (11 Fost.) 292; *West v. Murph*, 8 Hill (S. C.), 284.

(554) See *Howard v. Babcock*, 21 Ill. 259; *Bennett v. O'Brien*, 37 id. 250; *Wilcox v. Hogan*, 5 Ind. 546.

(555) This class embraces pledges or pawns. The distinction made between a *pledge* and a *mortgage* is, that in the case of a pledge the title remains in the pledgor, and in the case of a mortgage it passes to the mortgagee, subject to be divested. *M Lean v. Walker*, 10 Johns. 471; *Tucker v. Buffington*, 15 Mass. 490; *Day v. Swift*, 48 Me. 368; *Sims v. Canfield*, 2 Ala. 555. To constitute a pawn or pledge there must be a delivery and retention of the possession of the thing pawned. *Walcott v. Keith*, 23 N. H. (3 Fost.) 196; *First, etc., Bank v. Nelson*, 38 Ga. 391; *Beeman v. Lawton*, 37 Me. 543; *Thompson v. Andrews*, 8 Jones' Law (N. C.), 453.

Before selling a pledge the creditor must call upon the debtor to redeem, and give him notice of the time and place of sale. *Bryan v. Baldwin*, 53 N. Y. (7 Sick.) 232. See *Alexandria, etc., R. R. Co. v. Burke*, 23 Gratt. (Va.) 254. A pledgee, with power to sell, does not lose his lien by employing the pledgor as his agent to make the sale, and in his own name. *Thayer v. Dwight*, 104 Mass. 254. As to the liability of a pledgee, see *Noland v. Clark*, 10 B. Monr. (Ky.) 239; *Goodall v. Richardson*, 14 N. H. 567.

Every bailee for hire has a lien on the subject-matter of the bailment, for compensation due to him in respect of his work and labour bestowed upon it; and therefore he is not bound, unless it be otherwise specially agreed, to restore the thing bailed until that compensation has been paid him (*f*). (556) A tailor who has made clothes out of cloth sent to him by a customer, is not in strictness bound to deliver them to his employer until paid for the work and labour bestowed upon them by his direction. Nor is a jeweller who has received a gem to set, or a seal to * engrave, bound to restore it until [* 228] his charges for work bestowed upon it have been liquidated. In either of these cases the lien is designated as specific, *i. e.*, the right is co-extensive merely with the claim in respect of the work and labour bestowed upon the thing in question; it could not be asserted in regard to other debts or other claims which might have accrued to the bailee as against the bailor. Such a right of specific lien is recognised by our law as available in all trades, and under very dissimilar circumstances; whereas to support a general lien, *i. e.* a right to detain the thing bailed in respect of all outstanding antecedent claims, which is an "encroachment on the common law," evidence of usage to that effect in the particular trade or profession must be given (*g*), or at all events the question whether such a general right of lien exists in the particular case must have been affirmatively settled.

The right of lien is clearly founded on possession, and if, after the lien has attached, the party claiming it, or entitled to claim it, once part with the possession of the goods, the right of lien upon them will be gone (*h*). This particular remedy, moreover, must be enforced by the act of the person claiming it; our common law aids him merely by recognizing his right, but declines to give him the costs incurred in enforcing it, or to compensate him for damages, pecuniary or otherwise, which he may have sustained whilst enforcing it (*i*).

Within the last of the three leading classes of bailments previously mentioned, is included the bailment of goods to a common carrier. A common carrier is one who holds himself out to the public as undertaking to convey the goods of applicants from place to place. If a man profess to be a carrier, the law creates for him a duty to receive * goods [* 229] brought to him for carriage, so that the carrier may incur liability for refusing to receive them (*k*). The common law duty thus imposed on the carrier may, however, in many respects, be regulated according to his will; for he may choose the kind of conveyance to be used, the times for transit, the mode of delivery, the articles which alone he will undertake to carry, what price he will charge for carriage, when he will be paid; moreover, the duty to receive is always limited by the capability to carry (*l*).

(*f*) Story, Bailments, 5th ed. 456.

(*g*) *Brandão v. Barnett*, 12 Cl. & F. 787.

(*h*) *Per Buller, J., Lockbarrow v. Mason*, 2 T. R. 72; 1 H. Bl. 357; Cross on Lien, 38.

(*i*) *Somes v. British Empire Insur. Co.*, 8 H. L. Cas. 338.

(*k*) *Pickford v. Grand Junction R. Co.*, 8 M. & W. 372; *Hales v. London and N. W. R. Co.*, 4 B. & S. 66.

Lord Holt says (*Lane v. Cotton*, 12 Mod. 434) that wherever any subject takes upon himself a public trust for the benefit of the

rest of his fellow-subjects, he is, *eo ipso*, bound to serve them in all things within the reach and comprehension of the trust which he has assumed. Upon this principle, an action will lie against a carrier if, his horses being not loaded, he refuse to take a package proper to be sent by him.

No carrier is bound to receive goods which are "specially dangerous," 29 & 30 Vict. c. 69, s. 6.

(*l*) *Johnson v. North Midland R. Co.*, 4 Exch. 367.

(556) See *Wilson v. Martin*, 40 N. H. 88; *Lovett v. Brown*, id. 511; *Farrington v. Meek*, 30 Miss. 578; *Nevan v. Roup*, 8 Iowa, 211.

The case of loss caused by the felonious act of the carrier's servants is, by sect. 8, taken altogether out of the operation of the statute (x).

The next important enactment affecting carriers, is "The Railway and Canal Traffic Act" (17 & 18 Vict. c. 31); under sect. 2 of which a company, within the purview of the act (y), is required to afford "all reasonable facilities" for the receiving, forwarding, and delivering of traffic; and such companies are precluded from giving "any undue or unreasonable preference or advantage" to any person, or from subjecting him, or any particular description of traffic, to "undue or unreasonable prejudice or disadvantage in any respect whatsoever." Under sect. 3, a company infringing these provisions of the act may be restrained from continuing to do so by injunction.

Before the powers conferred by these two sections are put in motion, the court must be satisfied that some undue preference is being shown to an individual, or that some substantial damage is being done or inconvenience caused to the public (z); and they must further be satisfied that the complaint is *bond fide* made on behalf of the public, for whose benefit—not for that of individuals—the statute must be taken to have been passed (a). A complaint of undue preference is often founded on and supported by evidence of inequality of charge. The intention manifested in the act was to give equal advantages, so far as the rate of charge is concerned, to all persons similarly circum-
[* 234] *stanced. A railway company, indeed, may be entitled to lay down rules in reference to special circumstances, provided in doing so they act *bond fide* with regard to their own interests and those of the public; but they are not at liberty to make particular bargains with particular individuals, whereby one person is benefited and another injured (b).

The 7th section of the Railway and Canal Traffic Act is very material; it enacts as follows:—That every company to which it applies "shall be liable for the loss of, or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability;" every such notice, condition, or declaration being declared to be null and void: but the company may make such conditions with respect to the receiving, forwarding, and delivering of any of the said animals or things as shall be adjudged by the court or judge before whom any question relating thereto is tried, to be "just and reasonable." Provided, however, that no greater damages shall be recovered for loss of or for injury done to any of such animals, beyond the sums specified in the act (c), "unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be
[* 235] respectively of higher *value" than that mentioned in the act, in which case the company may demand and receive, by way of compen-

(x) *Machu v. London and South Western R. C.*, 2 Exch. 432; *Metcalf v. London, Brighton, &c., R. C.*, 4 C. B. N. S. 307, 311.

(y) See sect. 1 (the interpretation clause).

(z) *Ex parte Painter*, 2 C. B. N. S. 702.

(a) *Re Beadell*, 2 C. B. N. S. 509.

(b) *Garton v. Bristol and Exeter R. C.*, 6 C. B. N. S. 639; *Harris v. Cockermouth and Workington R. C.*, 3 C. B. N. S. 693; *Ransom's Case*, 1 C. B. N. S. 437; *Re Caterham R. C.*, *Id.* 410; *Re Palmer v. London and South Western R. C.*, L. R. 1 C. P. 588.

In the Special Act constituting a railway company, an "equality clause" is usually if not always inserted, which is meant to regulate the dealings of the company with their customers. See *Bazendale v. South Western R. C.*, L. R. 1 Ex. 137.

(c) That is to say—for any neat cattle, per head, 15l.; for any sheep or pigs, per head, 2l.

sation for the increased risk and care thereby occasioned, a reasonable percentage upon the excess of the value so declared above the respective sums limited in the act: and such per-centage or increased rate of charge shall be notified in the manner prescribed in the Carriers' Act (sect. 2), and shall be binding upon the company as therein mentioned: provided also, that "the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation" for the loss or injury sustained. Further, no "special contract" between a railway or canal company and any person respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things, will be valid and binding unless signed by him or by the person delivering the animals or things for carriage.

The above enactment does not alter or affect the rights, privileges, or liabilities of any railway or canal company with respect to articles such as mentioned in sect. 1 of the Carriers' Act; and as regards cattle, horses, and other goods, not within the previous statute, a contract between the company and a customer, if just and reasonable, and signed as required, will be efficacious to relieve the company from an undue degree of liability (*d*).

The course of legislation in regard to carriers such as we have been considering, terminates for the present with * an important provision contained in the 31 & 32 Vict. c. 119, which enacts, that where a company by through-booking contracts to carry any animals, luggage, or goods from place to place, partly by railway and canal and partly by sea, a condition exempting the company from liability for any loss or damage which may arise during the carriage of such animals, luggage, or goods by sea, from "the act of God, the king's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever," shall, if published conspicuously in the office where such through-booking is effected, and if legibly printed on the receipt or freight note given by the company for the animals, luggage, or goods, be valid as part of the contract between the consignor and the company, in like manner as if the company had signed and delivered to the consignor a bill of lading containing such condition (*f*). And where a railway company works steam vessels in connection with its land traffic, the provisions of the stat. 17 & 18 Vict. c. 31, so far as applicable, have been, by the above more recent enactment, extended to such steamers and the traffic carried on thereby; and some special regulations for securing equality of treatment of passengers using such steamers have been promulgated (*g*).

A carrier's liability in respect of goods committed to his charge ordinarily continues until the delivery of the goods either is completed or has been waived by the owner. As soon as the goods have reached their destination, and no further duty remains to be discharged by the carrier in reference to them, his liability as such ceases (*h*). He may, however, thereupon assume

(*d*) The leading case upon this enactment is *Peck v. North Staffordshire R. Co.*, 10 H. L. Cas. 478. There the effect of a condition which was contained in a contract between the company and their customer, would, if valid and operative, have been to exempt the company from responsibility for damage done to the customers' goods, however caused, *ex gr.* if caused by gross negligence, by fraud, or dishonesty on the part of the servants of

the company; this condition was held to be neither just nor reasonable.

See also *M'Manus's Case*, 4 H. & N. 327; *Lord v. Midland R. Co.*, L. R. 2 C. P. 339; *Roth v. North Eastern R. Co.*, L. R. 2 Ex. 173.

(*f*) 31 & 32 Vict. c. 119, s. 14.

(*g*) 31 & 32 Vict. c. 119, s. 16.

(*h*) See Chitty and Temple on the Law of Carriers, p. 86; *Shepherd v. Bristol and Exeter R. Co.*, L. R. 3 Ex. 189.

another character, and with it another liability. A carrier, when the transit [* 237] of the goods is ended, may, for instance, * assume the character of warehouseman, and then it may be matter of much nicety (supposing the goods entrusted to him to be lost or damaged) to decide in which character the bailee is to be held answerable for them: and this question is one of importance, forasmuch as damages may on one view of the case be recoverable, which would not be so on the other. Thus, a common carrier is liable for loss by fire, unless caused by the act of God, whereas a warehouseman is not liable for loss by fire unless he has been guilty of negligence (i).

Again, a carrier, in consideration of the compensation paid to him as such, may undertake to act also as warehouseman for a reasonable time, should the goods for so long be allowed to remain in his custody. On this state of facts, the remuneration for carrying is meant to cover the risk of warehousing; also, if the goods be negligently lost whilst warehoused, the liability of the carrier and warehouseman will be that which attaches to a bailee for hire, not that which attaches to a gratuitous bailee (k). The liability of a warehouseman ordinarily begins as soon as the goods arrive at the warehouse and the crane is applied to raise them into it. It ends when the goods are delivered to the owner or his order (l).

Inasmuch as a railway company sometimes establishes a line of steamers plying in connection with its trains, a loss of goods delivered to the company for conveyance might occur whilst such goods were in the hands of the company as wharfingers, not as carriers or as warehousemen. The liability of a wharfinger is that of a depositary for hire; he must extend ordinary or reasonable diligence to the thing bailed: and the principal difficulty here may be in determining when the custody of the goods by the company in the capacity of wharfingers begins and when it terminates. Goods are often in a wharfinger's [* 238] * possession with a view to being put on board ship for exportation, and in this case a delivery of the goods into the possession, actual or constructive, of the owners of the ship will discharge the wharfinger from liability (m). And even where the goods sustained damage whilst actually in the custody of the wharfinger and by his negligence, he may possibly succeed in showing that they were then in his custody gratuitously, and that he has not been guilty of gross negligence, in respect of which alone a gratuitous bailee is answerable (n).

The old customary law of England which applies to *bona et catalla*, is not altogether applicable to the persons of passengers conveyed by a land carrier, nor do the statutory provisions which have latterly been under our notice apply to them. When a passenger has paid for and received his ticket at the booking office (o) of a railway company for conveyance from one terminus to another, this ticket indicates in some sort the journey which the passenger is to take; so that we have thus presented to us the essential elements of a contract, executed on the one side by payment of the fare, and executory on the other between the passenger and the company. We have the consideration in the shape of money moving from the passenger,

(i) *Garside v. Trent and Mersey Navigation*, 4 T. R. 581.

(k) *Cairns v. Robins*, 8 M. & W. 258.

(l) Story, *Bailments*, 5th ed., p. 466.

(m) Story, *Bailments*, 5th ed., 474.

(n) *White v. Humphery*, 11 Q. B. 48.

(o) In which the fares payable for tickets there issued must be posted up, 31 & 32 Vict. c. 119, s. 15.

and an undertaking by the company to convey him, of which the extent and limits are set forth more or less precisely on the ticket. When this contract has been entered into, the company do not, as does a common carrier of goods, insure against all injuries unless caused by the act of God or by public enemies; they undertake merely that they and their agents are possessed of competent skill, and that they will use all due care and diligence in the performance of their duty. A carrier of passengers is only liable for negligence (*p*), and the duty cast upon * him will consequently be to carry safely those whom [* 239] he receives as passengers so far as human care and foresight will avail (*q*).

But although a carrier of passengers does not insure their safety, it may be almost superfluous to observe that for negligence causing personal hurt to a passenger, whether *in transitu*, at the terminus, or at a roadside station, a railway company will, in the absence of misconduct or contributory negligence by the passenger himself, be clearly responsible (*r*). A passenger carrier, moreover, holding himself out as such, seems bound to carry, so far as his means of accommodation may avail, any person being in a fit state to associate with his fellows and duly tendering his money for conveyance (*s*). And an obligation is imposed on a railway company, by the issue of a passenger ticket for a certain train, to forward the passenger by that particular train without undue delay or retardation. Circumstances may doubtless qualify this obligation, for although on the one hand the company could not exonerate themselves from it by arbitrarily limiting the number of carriages composing the train in question, yet on the other hand, out of regard to safety, they might well be justified in declining to attach additional carriages to the engine, or to run extra trains for the accommodation of those who had bought tickets; though in this case the passage-money received might have to be refunded by the company on demand.

In order, also, to charge a company such as spoken of * for damage [* 240] caused by the unpunctuality of a train, evidence must be given of some undertaking or representation by the company or their servant that the train in question is to arrive within a given time at the station named. The mere expression of an opinion to that effect by an agent of the company would not suffice (*t*). And as regards passenger trains, we must remember that railway companies almost invariably protect themselves against the consequences of any irregularity in their departure and arrival by inserting notices in their time-tables that they do not warrant that the trains will arrive and depart at the precise times indicated (*u*). The liability of the company may further be modified by their special act and bye-laws (*x*).

A passenger who has conformed to the regulations of a railway company

(*p*) *Crofts v. Waterhouse*, 3 Bing. 319, 321.

(*q*) As to the duty of a railway company in providing a roadworthy carriage for passengers, see *Redhead v. Midland R. C.*, L. R. 2 Q. B. 412.

(*r*) See, as exemplifying the text, *Martin v. Great Northern R. C.*, 16 C. B. 179; *Siner v. Great Western R. C.*, L. R. 4 Ex. 117; *Great Northern R. C. v. Harrison*, 10 Exch. 376; *Toomey v. London, Brighton, and South Coast R. C.*, 8 C. B. N. S. 146; *Cornman v. Eastern Counties R. C.*, 4 H. & N. 781.

(*s*) *Denton v. Great Northern R. C.*, 5 E. & B. 860; *Briddon v. Great Northern R. C.*, 28 L. J. Ex. 51.

(*t*) *Hurst v. Great Western R. C.*, 19 C. B. N. S. 310.

(*u*) *Lord v. Midland R. C.*, L. R. 2 C. P. 339, 345.

(*x*) See *Jennings v. Gt. Northern R. C.*, L. R. 1 Q. B. 7. *Dearden*, app., *Townsend*, resp., *Id.* 10.

concerning luggage (y), by paying for it, if required, and duly placing it in their custody, may sue the company for its loss, or for damage done to it, unless disentitled to do so by his own fraud (z). Further, although in general an action against a carrier for loss of goods may be founded indifferently in contract, or in tort for negligence and breach of duty, this proposition must not be lost sight of, that an action *ex contractu* needs privity to support it, [*241] whereas a duty may be owing to one with *whom no privity exists (a). In such an action, if rightly brought, damage legally and naturally flowing from the breach of contract or of duty is recoverable (b).

Where, as now frequently happens, a railway company possesses at its principal termini and stations hotels for the accommodation of passengers, liabilities may attach to such a company in the character of innkeepers differing essentially from those which attach to them as carriers. (557)

(y) Luggage may be said to include such articles of necessity or convenience as usually accompany passengers for their personal use, not merchandise or valuables designed for sale. See *Phelps v. London and North Western R. C.*, 19 C. B. N. S. 321. Story, *Ballments*, 5th ed., 527.

(z) A common form of fraud or attempted imposition upon a railway company is the putting of merchandise into the luggage of the passenger, with a view to avoiding payment of the fare which might be demanded

for it. *Rumsey v. North Eastern R. C.*, 14 C. B. N. S. 641. Under such circumstances no undertaking or contract arises by the company in regard to the merchandise, so as to enable the passenger to sue for loss of it. *Belfast and Ballymena R. C. v. Keys*, 9 H. L. Cas. 556.

(a) *Martin v. Great Indian Penins. R. C.*, L. R. 8 Ex. 9.

(b) *Hadley v. Bazendale*, 9 Exch. 341; *Woodger v. Gt. Western R. C.*, L. R. 2 C. P. 318.

(557) *Common carriers.* Common carriers include all persons whose business it is to carry goods for a reward. Such are railway companies, masters of vessels, bargemen, ferrymen, truckmen, expressmen, porters, carters, etc. See *Alexander v. Greene*, 7 Hill, 544; *Kimball v. Rutland & Burlington R. R.*, 26 Vt. 247; *Buckland v. Adams Express Co.*, 97 Mass. 124; *Slimmer v. Merry*, 23 Iowa, 90; 2 Kent's Com. 598, 599. And it has been held that a person who undertakes, though only *pro hac vice*, to carry by river, for hire, without special contract, incurs the responsibility of a common carrier. *Moss v. Bettis*, 4 Heisk. (Tenn.) 661. And see *Favor v. Philbrick*, 5 N. H. 358. But see *Fish v. Chapman*, 2 Ga. 349; *Samms v. Stewart*, 20 Ohio, 69; *Satterlee v. Groat*, 1 Wend. 272. A carrier by land and by water has the same liabilities. *Pardee v. Drew*, 25 Wend. 459; *Powell v. Myers*, 26 id. 591; *Stokes v. Saltonstall*, 18 Pet. (U. S.) 181; *Hall v. Connecticut Steamboat Co.*, 18 Conn. 319; *King v. Shepherd*, 3 Story, 356. A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for hire or reward. *Pennewill v. Cullen*, 5 Harr. (Del.) 238. See *Fish v. Clark*, 49 N. Y. (4 Sick.) 122.

The responsibility incurred by a private carrier is that of an ordinary bailee for hire. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 83. But a common carrier is not only responsible for negligence, but is an insurer against any loss not occasioned by act of God, the public enemies, or the fault of the party suffering the loss. *Kohannan v. Hammond*, 42 Cal. 227; *Chase v. Washington Ins. Co.*, 12 Barb. 595; *Friend v. Woods*, 6 Gratt. (Va.) 189; *Steele v. Franklin Ins. Co.*, 17 Penn. St. 290; *Lea v. Stroud*, 2 Binn. (Penn.) 74; *Ewart v. Street*, 2 Bailey (S. C.), 157; *Richards v. Gilbert*, 5 Day (Conn.), 415; *Daggett v. Shaw*, 3 Mo. 264; *New Brunswick Co. v. Tiers*, 4 Zab. (N. J.) 697. If the proximate cause of the loss is the act of God or the public enemy, the carrier is not liable, although his own negligence or laches contributed as a remote cause. *Railroad Co. v. Reeves*, 10 Wall. (U. S.) 176. The expression, "act of God," denotes natural accidents, such as lightning, earthquake, and tempest, and not accidents arising from the fault or negligence of man. See *McArthur v. Sears*, 21 Wend. 190; *Colt v. M. Mechen*, 6 Johns. 160; *Walpole v. Bridges*, 5 Blackf. (Ind.) 232; *Robertson v. Kennedy*, 2 Dana (Ky.), 480; *Harpell v. Owens*, 1 Dev. & Bat. (N. C.) 273. So, losses arising simply from natural causes, however violent, would not, if they might have been avoided, be losses by the "act of God." See *McCall v. Brock*, 5 Strobl. (S. C.) 119; *Richards v. Gilbert*, 5 Day (Conn.), 415; *Klauber v. American Express Co.*, 21 Wis. 21; *Mer-*

An innkeeper is at common law bound to receive a guest, and to find for him reasonable and proper accommodation (*c*). He is bound, also, to take due care of the goods and baggage of his guest deposited in his house, and to

(*c*) *Fell v. Knight*, 8 M. & W. 269, 276.

shon v. Hobensack, 2 Zab. (N. J.) 373; *Plaisted v. B. & K. Steam Nav. Co.*, 27 Me. 132; *Hays v. Kenedy*, 41 Penn. St. 378; *Redpath v. Vaughan*, 52 Barb. 498; *Merritt v. Earle*, 29 N. Y. (2 Tiff.) 115; *Wolf v. American Express Co.*, 48 Mo. 422; *Price v. Hartshorn*, 44 N. Y. (5 Hand) 94. As to the meaning of the term, "public enemy," see *Philadelphia, etc., R. R. Co. v. Harper*, 29 Md. 330; *Lewis v. Ludwick*, 6 Coldw. (Tenn.) 368; *Porcher v. North Eastern R. R. Co.*, 14 Rich. (S. C.) 184.

A carrier is bound to provide vehicles suitable for the purposes of carriage (*Hawkins v. Great Western R. R. Co.*, 17 Mich. 57; *Empire Transp. Co. v. Wamsutta Oil Co.*, 63 Penn. St. 14); and he must proceed without deviation, and by the usual route, to guard against all dangers. See *Powers v. Davenport*, 7 Blackf. (Ind.) 497; *Wibert v. N. Y. & E. R. R.*, 19 Barb. 36. So, he must obey the direction of the owners with regard to the goods (*Maghee v. Camden & A. R. Co.*, 45 N. Y. [6 Hand] 514; *Clark v. Spence*, 10 Watts [Penn.], 336; *Hastings v. Pepper*, 11 Pick. [Mass.] 41); and must carry them to their destination without unreasonable delay. *Rome R. R. Co. v. Sullivan*, 14 Ga. 277; *Illinois Central R. R. Co. v. Owens*, 53 Ill. 391; *Grund v. Pendergast*, 58 Barb. 216.

A common carrier is not liable until there has been a delivery of the goods to him, or his authorized servants or agents, actually or constructively. *Blanchard v. Isaacs*, 3 Barb. 388; *Tower v. The U. & S. R. R. Co.*, 7 Hill, 47; *Merriam v. Hartford, etc., R. R. Co.*, 20 Conn. 354; *Rogers v. Wheeler*, 52 N. Y. (7 Sick.) 262; *Reed v. Phila., etc., R. R. Co.*, 3 Houst. (Del.) 176. But as soon as the goods are fairly delivered, and the duty of immediate transportation arises, the responsibility of the common carrier attaches to them, even before they are on the journey. *Barron v. Eldredge*, 100 Mass. 455; S. C., 1 Am. Rep. 126; *Watts v. Boston & L. R. Co.*, 106 Mass. 466; 2 Story on Cont., § 987. See *Rogers v. Wheeler*, 52 N. Y. (7 Sick.) 262; *Illinois Central R. R. Co. v. McClellan*, 54 Ill. 58; *Lakeman v. Grinnell*, 5 Bosw. 625.

The carrier's risk is held to terminate when the goods are deposited at their proper place of destination (see *Smith v. Nashua & Lowell R. R.*, 7 Fost. [N. H.] 86); or as soon as the owner has had a reasonable time to remove them. *Jeffersonville R. R. Co. v. Cleveland*, 2 Bush (Ky.), 473; *Mills v. Michigan C. R. R.*, 45 N. Y. (6 Hand) 622. Common carriers by land are ordinarily bound to deliver or tender the goods to the consignee at his residence or place of business; but when the consignee cannot be found with reasonable diligence the carrier may relieve himself from liability by depositing the property in a suitable place for the owner. *Witbeck v. Holland*, 45 N. Y. (6 Hand) 13; S. C., 6 Am. Rep. 23. In the absence of usage or special contract, carriers by vessels, boats, and railways, are exempt from the duty of personal delivery. *Id.*; *Thomas v. Boston R. R. Co.*, 10 Metc. (Mass.) 473; *Vincent v. Chicago & A. R. R.*, 49 Ill. 33. See *Farmers' & M. Bank v. Champlain T. Co.*, 23 Vt. 180, 211; *Chicago & A. R. R. v. Scott*, 42 Ill. 182; *Bansemmer v. Toledo & W. R. R. Co.*, 25 Ind. 434. In some States the liability of the carrier is held to remain until the consignee has had notice that the goods have arrived. See *Hermann v. Goodrich*, 21 Wis. 536; *Stephenson v. U. S. Express Co.*, *id.* 405; *Michigan C. R. R. v. Ward*, 2 Mich. 538; *Shenk v. Phila. St. Co.*, 60 Penn. St. 109, 115; *Russell Manuf. Co. v. N. H. Steamboat Co.*, 50 N. Y. (5 Sick.) 121; S. C., 52 id. 637; *Hedges v. H. R. R. Co.*, 49 id. 223; *McAndrew v. Whitlock*, 52 id. 40. It is thought that express companies are bound to make personal delivery. *Witbeck v. Holland*, 45 N. Y. (6 Hand) 13.

As to the American rule of liability, beyond the carrier's own line, consult the following authorities: *Hood v. N. Y. & N. H. R. R. Co.*, 22 Conn. 1; *Skinner v. Hall*, 60 Me. 477; *Green v. N. Y. Cent. R. R. Co.*, 4 Daly, 553; *Railroad Co. v. Manuf. Co.*, 16 Wall. (U. S.) 318; *Gray v. Jackson*, 51 N. H. 9; *Burroughs v. Norwich & W. R. R. Co.*, 100 Mass. 26.

Carriers of passengers are held responsible for injuries and losses arising from even the slightest negligence, and they are bound to exercise the utmost care and diligence. See *Taylor v. Grand Trunk Railway Co.*, 43 N. H. 304; *Dervoort v. Loomer*, 21 Conn. 245; *Sau-*

keep them day and night without abstraction or loss. The innkeeper is accordingly liable for the felonious taking of goods placed in his custody as innkeeper, and is responsible for the acts of his servants; indeed the property of a guest is, by legal implication, in the actual care and custody of the innkeeper, who by custom is responsible for its safety — at all events with some rare exceptions, such as the act of God or the king's enemies (*d*). And the innkeeper is bound in law to keep the property of his guest safe, without any stealing or purloining (*e*), provided it be within the inn or its appurtenances; for if a man comes to a common inn, and delivers his horse to the ostler, directing that it be put to pasture, which is done, and the horse is stolen, the innkeeper will not be liable, because he is answerable for nothing that is out of his inn, but for such things only as are within it (*f*). The innkeeper would [* 242] not, however, at common law, be liable for * loss of goods placed in a room of which his guest had the special charge, or where such loss was occasioned by the guest's own negligence (*f*).

The responsibility imposed upon an innkeeper at common law has been much diminished by the stat. 26 & 27 Vict. c. 41, reciting that "it is expedient to amend the law concerning the liability of innkeepers in respect of the goods of their guests." It enacts as follows — That no innkeeper shall be liable to make good to his guest any loss of or injury to goods or property brought to his inn (*g*) (not being a horse or other live animal, or any gear appertaining thereto, or any carriage) to a greater amount than the sum of 30*l.*, except — (1.) Where such goods or property have been stolen, lost, or injured through the wilful act, default, or neglect of the innkeeper or any servant in his employ; or (2.) Where such goods or property have been deposited expressly for safe custody with the innkeeper, provided that in the case of such deposit the innkeeper may, if he think fit, require, as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same (*h*).

If, however, the innkeeper refuse to receive for safe custody, as just mentioned, the goods or property of his guest, or if such guest, through any default of the innkeeper, be unable to deposit his goods or property as

(*d*) *Dansey v. Richardson*, 3 E. & B. 144.

(*e*) *Calye's Case*, 8 Rep. 32.

(*f*) *Calye's Case*, *supra*; *Dansey v. Richardson*, 3 E. & B. 144.

(*g*) *Burgess v. Clements*, 4 M. & S. 306; *Cashill v. Wright*, 6 E. & B. 695; *Morgan v. Ravey*, 6 H. & N. 265.

(*h*) By sect. 4, "the word 'inn' shall mean any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and

property of his guests; and the word 'innkeeper' shall mean the keeper of any such place."

(*h*) Sect. 1. Of this section the innkeeper must cause at least one copy, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he will be entitled to the benefit of the act in respect of such goods or property only as may be brought to his inn while such copy shall be so exhibited. Sect. 8.

yer v. Hannibal & St. Joseph Railroad Co., 37 Mo. 240; *Simmons v. New Bedford Steamboat Co.*, 97 Mass. 361, 368; *Penn. R. R. Co. v. Henderson*, 51 Penn. St. 315. As it regards baggage and luggage, carriers of passengers are said to have the liabilities of common carriers. On this subject, see *Jones v. Voorhees*, 10 Ohio, 145; *Cole v. Goodwin*, 19 Wend. 251; *Merrill v. Grinnell*, 30 N. Y. (8 Tiff.) 594; *Dunlap v. Int. St. Co.*, 98 Mass. 371; *Miss. Cent. R. R. v. Kennedy*, 41 Miss. 671; *Smith v. Boston & Me. R. R.*, 44 N. H. 335; *Cin. & Chicago Air Line R. R. v. Marcus*, 38 Ill. 219. The duties of railroads as to passengers and their baggage are, to a greater or less extent, regulated by statute in the different States.

* aforesaid, the innkeeper will not be entitled to the benefit of the act [* 243] in respect thereof (i). (558)

Although, as recently decided, the Carriers' Act extends protection where the contract is to carry goods partly by land and partly by water, and the loss has occurred during the transit by land (j), it does not apply to the conveyance of goods in a sea-going ship. In this case, accordingly, the parties interested must protect themselves by mutual stipulations, though the legislature has from time to time interposed with a view to modifying their arrangements.

The contract by which an entire ship, or some principal part of it, is let to a merchant for the conveyance of goods on a determined voyage to one or more places, is termed a charter-party (k), the charterer of the ship causing it to be laden wholly or in part with goods belonging to other persons; in relation to whom it seems that he is to be considered as owner of the ship (l). Now, when goods are put on board ship in pursuance of a charter-party, the practice is that the master signs for them bills of lading, usually two or three in number, the charter-party being the instrument and evidence of the contract for conveyance, and the bill of lading the evidence of the shipping of the particular merchandize to be conveyed (m). This latter instrument operates in part as an acknowledgment that the goods specified in it have been shipped, and in part operates as an undertaking that such goods shall be delivered at the distant port to the consignee or his assigns, or to the order of the consignor, in like condition, subject to certain exceptions, as when shipped (n).

* The bill of lading is thus a symbol of the property referred to in [* 244] it, and, as formerly stated (o), the vendee and consignee of goods at a distant port may, by assigning over this instrument to a *bonâ fide* transferee, defeat the right of stoppage *in transitu* vested in the vendor in the event of his (the vendee's) insolvency; upon this rule, however, being engrafted the qualification that by indorsing over the bill of lading, the vendor's right may be defeated. The actual holder of an indorsed bill of lading may consequently, by indorsement, transfer a greater right than he himself had; that is to say, he may give an indefeasible right in lieu of the defeasible title which he himself possessed (p). This peculiar property of a bill of lading is derived from its negotiable quality, and is limited to the case where the person who trans-

(i) Sect. 2.

(j) *Le Conteur v. London and So. West. R.* C., L. R. 1 Q. B. 54.

(k) Abbott on Shipping, 11th ed., 195.

(l) *Id.* 34.

(m) *Id.* 235.

(n) As to the passing of the property in goods by a delivery of the bill of lading, see *Shepherd v. Harrison*, L. R. 4 Q. B. 196.

(o) *Ante*, pp. 163-5.

(p) *Jenkyns v. Usborne*, 7 M. & Gr. 699.

(558) The responsibilities of an innkeeper are said to be nearly coincident with those of a common carrier. See *Berkshire Woolen Co. v. Proctor*, 7 Cush. (Mass.) 417; *Mason v. Thompson*, 9 Pick. (Mass.) 283; *Sibley v. Aldrich*, 33 N. H. 553; *Cohen v. Frost*, 2 Duer, 841. As to distinctions between innkeepers and lodging-house keepers, see *Pinkerton v. Woodward*, 33 Cal. 537, 596; *Walling v. Potter*, 35 Conn. 183; *Wintermute v. Clark*, 5 Sandf. 242; *Bernstein v. Sweeney*, 1 Jones & Sp. 371. See, generally, as to the liabilities of innkeepers, *Read v. Amidon*, 41 Vt. 15; *Kelsey v. Berry*, 42 Ill. 469; *Wilkins v. Earle*, 44 N. Y. (5 Hand) 172; S. C., 4 Am. Rep. 655; *Shaw v. Berry*, 31 Me. 478; *Norcross v. Norcross*, 53 id. 163; *Treiber v. Burrows*, 27 Md. 130; *Simon v. Miller*, 7 La. Ann. 360. As to the meaning of "guest," see *Hall v. Pike*, 100 Mass. 495; *Pinkerton v. Woodward*, 33 Cal. 577; *Carter v. Hobbs*, 12 Mich. 62; *Washburn v. Jones*, 14 Barb. 193; *Walling v. Potter*, 35 Conn. 183.

fers the right is himself in possession of, and in a situation to transfer the instrument (g).

The stat. 18 & 19 Vict. c. 111, intituled "An Act to amend the Law relating to Bills of Lading," leaves * untouched the right of stoppage *in* [*245] *transitu* enjoyed by the consignor of goods; by its first section, however, there is vested in the indorsee of a bill of lading the right to sue and the liability to be sued upon it in like manner as if the contract contained therein had been made with himself (r). Moreover, by sect. 3 of the same statute, the bill of lading in the hands of a consignee or indorsee for value, representing goods to have been shipped on board a vessel, is now conclusive evidence of such shipment as against the master or other person signing it, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless the holder of the bill of lading had actual notice on receiving the same that the goods had not been in fact put on board; and the master or other person signing the bill may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or of some person under whom the holder claims (s).

A bill of lading signed by the captain of a ship is not only an acknowledgment by him of the receipt of the goods mentioned in it, it is also an undertaking that such goods are to be delivered, in like "good order and condition," at the distant port—subject, however, to these important exceptions—"the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the sea, rivers, and navigation of what kind and nature soever." Within one or other of these exceptions, therefore, or of any additional exceptions which may be inserted, it behoves the shipowner, if charged for loss of, or damage done to, the goods, to bring himself (t), though his liability to [*246] make compensation for * such loss or damage has been limited, as presently mentioned.

Where an express contract has been entered into for the conveyance of a passenger on board a sea-going ship, the rights of the parties will be governed by its terms, interpreted by the usage of the particular trade or voyage; and where the contract is not express, it may be evidenced by such usage (u). By reason, however, of the impositions practised upon passengers on board ship, and the hardships to which they are often subjected, various enactments (x)

(g) We read in a recent judgment the following passage explanatory of the text. A bill of lading, in the common form, for the delivery of goods to "order and assigns," is a negotiable instrument which, by indorsement and delivery, passes the property in the goods to the indorsee, subject only to the right of an unpaid vendor to stop them *in transitu*. The indorsee may deprive the vendor of this right by indorsing the bill of lading for valuable consideration, although the goods are not paid for, or bills have been given for the price of them which are certain to be dishonoured, provided the indorsee for value has acted *bond fide* and without notice. Although a bill of lading is a negotiable instrument, it is so only as a symbol of the goods named in it; and although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not

affected by any appropriation of it without his authority; and if it be stolen from him or transferred without his authority, a subsequent *bond fide* transferee for value cannot make title under it as against the shipper of the goods, for in the cases put there could be no lawful assigns of the shipper, and consequently the bill of lading could have no existence as a negotiable instrument. Judgm., *Pease v. Gloaghe*, L. R. 1 P. C. 237—238, citing *Gurney v. Behrend*, 3 E. & B. 634.

(r) *Dracachi v. Anglo-Egyptian Nav. Co.*, L. R. 3 C. P. 190.

(s) See *Jessel v. Bath*, L. R. 2 Ex. 287.

(t) *Kay v. Wheeler*, L. R. 3 C. P. 803; *Ohrloff v. Briscoe*, L. R. 1 P. C. 281; *Phillips v. Clark*, 2 C. B. N. S. 156.

(u) *Abbott on Shipp.*, 11th ed., 186—7.

(x) 17 & 18 Vict. c. 104, amended by 26 & 27 Vict. c. 51; see also 31 & 32 Vict. c. 119.

have been made by the legislature containing provisions calculated to promote their safety, health, personal comfort, and well-being.

Regard being had, however, to the provisions of Lord Campbell's Act (y), and to the great pecuniary responsibilities which might attach to shipowners in case of loss, the statute law provides as follows:—

That the owners of any ship, whether British or foreign, shall not, where any of the following events occur without their actual fault or privity—*sc.*, where loss of life or personal injury is caused to any person carried in such ship, or where damage or loss is caused to any goods, merchandize, or other things whatsoever on board such ship—be answerable in damages to an aggregate amount exceeding 15*l.* per ton of the ship's tonnage in respect of loss of life or personal injury, either alone or together with loss of, or damage to, goods, merchandize, or other things, nor to an aggregate amount exceeding 8*l.* per ton of the ship's tonnage in respect of loss of, or damage to, goods, merchandize, or other things, whether there be in addition loss of life, or personal injury or not (z). And further, it is provided that no owner of any sea-going ship * shall be liable to make good, to any extent whatever, any loss [* 247] or damage which may happen without his actual fault or privity to any goods or merchandize on board such ship by reason of fire, or to any gold, silver, diamonds, watches, or precious stones on board such ship by reason of robbery or embezzlement thereof, unless the owner or shipper of the same has, at the time of shipment, inserted in his bills of lading, or otherwise described in writing to the master and owner of such ship the true nature and value of such articles, or beyond the value of the ship and its freight, where, without his actual fault or privity, any damage or loss is caused to goods, merchandize, or other things on board such ship (a).

We have thus considered in order the three points specified at page 154 as deserving to be noticed in connection with a simple contract, the last of these having been "the thing to be done or not to be done." In treating, under this head, of various species of contracts, an arrangement was adopted which may have appeared to the reader in some respects defective, contracts having been divided into: (1), such as are required by statute or (2) by mercantile usage to be in writing; and (3), other contracts (b). Such a division of the subject, however, was adopted on the ground of its simplicity and practical utility, rather than because it is strictly accurate. Some important species of contracts are, from their very nature, almost necessarily evidenced by writing; and to others, which mainly fall under the particular head heretofore assigned to them, writing has, by positive enactment, in this or that particular been made essential. Such discrepancies, which to the logician may seem objectionable, in truth result from the combination and admixture, according to our constitutional system, of a written with *an unwritten law, from [* 248] the mode in which our written law has, from time to time, been fashioned and put together, and from the gradual though ceaseless influence of mercantile usage, which has fixed its impress upon our law of contracts.

(y) *Ante*, pp. 150, 151.

(z) 25 & 26 Vict. c. 63. s. 54.

(a) 17 & 18 Vict. c. 104, s. 503.

(b) *Ante*, p. 159.

[* 249]

*CHAPTER X.

JURISDICTION OF SUPERIOR COURTS OF LAW.

WRONGS TO PERSONAL PROPERTY.

IN pursuance of the plan indicated at a former page (a), we shall now enquire as to such wrongs as directly or indirectly affect the rights of property, and the remedies which our law has given to repair or redress them. In the present Chapter we shall speak of wrongs to personal, and in the ensuing Chapter of wrongs to real property, in accordance with our former division of property into personal and real (b): personal, which consists in goods, money, and all other moveable chattels, and things thereunto incident; a property which may attend a man's person wherever he goes, and from thence receives its denomination: and real property, which consists of such things as are permanent, fixed, and immoveable; as lands, tenements, and hereditaments, which are not annexed to the person, nor can be moved from the place in which they subsist.

We may, however, *in limine*, observe that torts cognisable at law may arise under circumstances akin to, or identical with, some which in the pages immediately preceding have been mentioned — fraud, negligence, or breach of duty, when causing damage, being usually remediable by action. Here, therefore, certain nice distinctions must be noticed — especially between warranty and false representation, and between negligence or breach of duty and breach of contract.

[* 250] * A contract, as formerly stated, is express or implied. A person who contracts as agent thereby impliedly undertakes and warrants that he has authority in that capacity to contract; and should he, in fact have no such authority, he will be answerable according to the facts, *i. e.*, the absence or presence of fraud, to an action of contract or of tort, in which may be recovered compensation for damages resulting as a direct consequence in the ordinary course of affairs from the alleged breach of contract or of faith (c); indeed, it holds generally true that if A fraudulently makes a representation which is false, and which he knows to be false, to B —, meaning that B shall act upon it, and B, believing it to be true, does act upon it, and so sustains damage, B may have an action against A for the deceit — there being here such a conjunction of wrong and loss as will entitle the injured party to redress (d); and a principal is clearly responsible for damage caused by the fraud or misrepresentation of his general agent, though difficulty may occur in fixing the principal with responsibility for the fraud of a particular agent (e). Again, if

(a) *Ante*, p. 154.

(b) See Book II. ch. 2.

(c) *Collen v. Wright*, 7 E. & B. 301; 8 *Id.* 647; *Simons v. Patchett*, 7 E. & B. 568; *Randell v. Trimen*, 18 C. B. 786; *Speeding v. Nevell*, L. R. 4 C. P. 212.

Where a contract is signed by one professing to sign "as agent," but who has no principal existing at the time, and the contract would be wholly inoperative, unless binding upon the person who signed it, he is person-

ally liable on the contract, and a stranger cannot, by a subsequent ratification of the contract, relieve the party signing it from that liability. *Kelner v. Baxter*, L. R. 2 C. P. 174.

(d) *Gerhard v. Bates*, 2 E. & B. 498—9; *Pasley v. Freeman*, 8 T. R. 51; *Mullett v. Mason*, L. R. 1 C. P. 559.

(e) *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Udell v. Atherton*, 7 H. & N. 172.

the vendor of an article, upon the sale, warrants it to be good, the law annexes a tacit contract to this warranty, that if it be not so, he shall make compensation to the buyer in an action purely *ex contractu* (*f*); whereas should there be *fraud in the transaction, an action on the case would lie to recover [* 251] damages; *ex. gr.*, if the vendor, knowing the goods to be unsound, used any art to disguise them, he would be answerable. Also, at common law, an action would lie for fraudulently marking iron with a stamp in imitation of the plaintiff's stamp, and selling it under pretence that it was the genuine manufacture of the plaintiff (*g*). And it has recently been enacted (*h*) that the vendor of an article bearing a trade mark shall be deemed to warrant that such mark is genuine, and not wrongfully used, unless the contrary be expressed in writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee (*i*). Further, that where a person sells a chattel bearing upon it any indication of its quantity, measure, or weight, or of the place in which it was manufactured, or produced, the sale or contract to sell shall be deemed to have been made with a warranty by the vendor that no such indication was in any material respect untrue, unless the contrary be expressed in manner aforesaid (*k*).

In cases such as have been specified, the form of remedy appropriate will, in the absence of express legislative intervention, be determined by applying this test: was there an ingredient of fraud and *mala fides* in the transaction under notice, or is there evidence merely of breach of contract?

Negligence may be defined to be the omission to do something [252] which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do (*l*). Negligence thus defined when productive of damage to an individual is actionable, and proof of negligence may, as appears from instances adduced in the preceding Chapter, suffice in support of an action founded upon breach of contract. Thus, there is in law an implied contract with a common innkeeper, to secure his guest's goods in his inn; with a common carrier, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common tailor, or other workman, that he performs his business in a workmanlike manner; in which, if he fail, an action lies to recover damages for such breach of undertaking. And when a skilled labourer or artist is employed to do work, there is on his part an implied warranty that he has skill and is reasonably competent for the task which he assumes to perform. The public profession of an art is a representation and undertaking to all that the professor possesses the requisite ability and skill. There is here

(*f*) A general warranty may not, however, extend to guard against a defect that is plainly and obviously the object of one's senses, as if a horse be warranted perfect, and wants either a tail or an ear, unless the buyer in this case be blind. But if cloth is warranted to be of such a length, when it is not, there an action *ex contractu* lies for damages; for that cannot be discerned by sight, but only by a collateral proof, the measuring it. And if a horse is warranted sound, and he wants the sight of one eye, though this seems to be the object of one's senses, yet as the discernment of such defect is frequently

matter of skill, it has been held that an action lies to recover damages for this imposition; Salk. 211.

(*g*) *Crawshaw v. Thompson*, 4 C. B. 857.

(*h*) 25 & 26 Vict. c. 88.

(*i*) Sect. 19.

(*k*) Sect. 20.

A person aggrieved by the forging or counterfeiting of a trade mark may recover damages against the guilty party (s. 22), and a conviction for any offence under the statute will not affect the civil remedy (s. 11).

(*l*) *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781, 4.

an implied contract to that effect, whereas a person not thus holding himself out as an expert would incur liability for want of reasonable skill, only in virtue of an express contract that he possessed or would exercise it (*m*).

Negligence, indeed, is comprised within the more general expression breach of duty, in reference to which it is established that where the law casts any duty upon a person which he refuses or fails to perform, he is answerable in an action to one whom his refusal or failure damages, for one who undertakes any office, employment, trust, or duty, contracts with those who employ or trust [*253] him, to *perform it with integrity, diligence, and skill (*n*). And, if by his want of either of those qualities any damage accrues to an individual, such person has in general a remedy by action. A few instances will illustrate this matter. If an officer of the public is guilty of neglect of duty, or a palpable breach of it, of non-feasance or of mis-feasance; as, if the sheriff does not execute a writ sent to him, or if he wilfully makes a false return thereto; in both these cases the party aggrieved may have an action against the sheriff for damages to be assessed by a jury (*o*). So negligence or breach of duty may, in accordance with the above principle, be imputed to the trustees of works to the use of which the public on payment of tolls or otherwise are entitled, as well if such trustees wilfully omit to avail themselves of means of knowledge respecting the condition of the works which they have in charge as if the actual existence of such knowledge be brought home to them, and for damage resulting from their neglect of duty, where established, they will in either case be liable (*p*).

Circumstances evidencing negligence or breach of duty may be infinitely various (*q*), sometimes giving rise indifferently to an action of contract or of tort, and sometimes to an action *ex delicto* only. With a view therefore to exemplifying the differences between breach of contract and negligence or [*254] breach of duty, the following state *of facts may be suggested. A. is the owner of a house, a portion of which is ruinous, and threatens to fall upon the contiguous building of C. A. being aware of this, demises the house to B., without himself repairing the dilapidation or requiring B. the tenant to repair it, but suffering it to continue as before. A., under such circumstances, will be liable to C. for damage caused to his premises by reason of A.'s building falling upon them (*r*), for A. was guilty of wrongful non-repair, which caused damage, and the fall of the building did not arise from an act of the lessee, but happened in obedience merely to the laws of nature. In a case of this sort there is no contract between A. and C., but there is a breach of duty owing by A. to C., and for the damage thence resulting, an action *ex delicto* is held to be maintainable by our law. Again, A. is the owner of premises bounded by a wall which he suffers to remain in a ruinous and dangerous condition. B., lawfully passing along a highway contiguous to the said wall, sustains hurt by its falling upon him. B. will have a right of action against

(*m*) *Harmer v. Cornelius*, 5 C. B. N. S. 236.
(*n*) *Ferguson v. Earl of Kinnoull*, 9 Cl. & F. 251.

(*o*) See *Hooper v. Lane*, 6 H. L. Cas. 443.
(*p*) *Mersey Docks v. Gibbs*, *Mersey Docks v. Penhallow*, L. R. 1 H. L. Cas. 93.

(*q*) For instance, an action has been held to lie for omitting to repair fences, whereby plaintiff's horse strayed on to defendant's land, and was there damaged, *Lee, app., v. Riley*,

resp., 18 C. B. N. S. 722; for omitting to fence a dangerous shaft, *Williams v. Groucott*, 4 B. & S. 149; for allowing sparks to escape from a locomotive engine, and so damaging a haystack, *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 733; and for causing explosions on adjoining land to frighten away the plaintiff's game, *Ibbotson v. Peat*, 8 H. & C. 644.

(*r*) *Todd v. Flight*, 9 C. B. N. S. 377.

A. to recover damages compensatory for the hurt which has been done him (s). Under these circumstances there is to be found no semblance of a contract, nor any connection or privity between A. and B.; the right of action contains in truth exclusively these elements—a general breach of duty on the part of A., and damage suffered by B. in consequence of such breach of duty. (559)

We will in the next place enumerate and briefly consider the wrongs that may be done to personal property as well by unlawfully taking, detaining, or converting it, as by injuring or causing consequential damage to it.

The right of property in external things being originally acquired by occupancy, and preserved and transferred by grants, deeds, and wills, in continuation of that occupancy; it follows as a necessary consequence, that

Unlawful taking. when *I once have gained a rightful possession of any [*255] goods or chattels, either by a just occupancy or by a legal transfer, whoever by force dispossesses me of them, is guilty of a transgression against the law of society, which is a kind of secondary law of nature. For there must be an end of all social commerce between man and man, unless private possessions be secured from unjust invasion: and, if an acquisition of goods by force were allowed to be a sufficient title, all property would soon be confined to the most strong, or the most cunning; and the weak and simple-minded part of mankind (which is by far the most numerous division) could never be secure of their possessions.

The wrongful taking of goods being thus clearly an injury, the next consideration is, what remedy the law of England has given for it. And this is by an action of trespass, technically described as *de bonis asportatis*, wherein the plaintiff may recover, not the thing itself, but only damages for the loss of it (t). (560)

Detinue and replevin (which, being somewhat anomalous in its nature, will be separately treated of at the end of this Chapter) are the only actions in which

Unlawful detainer. the specific possession of personal chattels is restored to the proper owner. For things personal are looked upon by the law as of a nature so transitory and perishable, that it is for the most part impossible either to ascertain their identity, or to restore them in the same condition as when they came to the hands of the wrongful possessor. And, since it is a maxim that "*lex neminem cogit ad vana, seu impossibilia*," our law there-

(s) *Duckworth v. Johnson*, 4 H. & N. 655.

(t) As to a taking of goods *animus furandi*, *post*, vol. iv.

(559) For an injury occasioned by want of due care and skill, in doing what one has promised to do, an action may be maintained against him in favor of the party relying on such promise, and injured by the breach of it, although there was no consideration for the promise. *Gill v. Middleton*, 105 Mass. 477; S. C., 7 Am. Rep. 548.

There is no absolute rule as to what constitutes negligence; and it is held a mixed question of law and fact, to be settled by a jury under the instructions of the court. *Rice v. Montpelier*, 19 Vt. 470; *Norris v. Litchfield*, 85 N. H. 271; *Philadelphia, etc., v. Spearren*, 47 Penn. St. 300; *McCully v. Clarke*, 40 id. 399; *Foot v. Wiswall*, 14 Johns. 304.

(560) To maintain trespass *de bonis asportatis* the taking need not have been with actual force (*Gibbs v. Chase*, 10 Mass. 180); nor is proof of malice necessary to sustain the action. *Whitewater Valley Canal Co., etc., v. Dow*, 1 Smith (Ind.), 62. But the possession of the chattel, actual or constructive, must be in the plaintiff at the time of the taking, or trespass will not lie. See *Putnam v. Wyley*, 8 Johns. 432; *Filler v. Shotwell*, 7 Watts & Serg. (Penn.) 14; *Soper v. Sumner*, 5 Vt. 274; *McCarty v. Vickery*, 12 Johns. 348.

fore contents itself in general with restoring, not the thing itself, but a pecuniary equivalent to the party injured; by giving him a satisfaction in damages.

Detinue lies for the illegal detention of another's goods, whether the original [*256] taking of them was lawful or * otherwise. As if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, not in the original taking, and the regular method for me to recover possession is by action of detinue (*u*); in which action it is necessary to ascertain the thing detained, so that it may be specifically known and recovered. Therefore detinue cannot be brought for money, corn, or the like; for that cannot be known from other money or corn; unless it be in a bag or a sack, for then it may be distinguishably marked. In order therefore to ground an action of detinue, which is only for the detaining, these points are necessary (*v*): 1. That the defendant has got into possession of and wrongfully detains the plaintiff's goods; 2. That the plaintiff had at the time of commencing the action a right to the immediate possession of them; 3. That the plaintiff had a property in them (*x*); and, 4. That they be ascertained in point of identity. Upon this the jury, if they find for the plaintiff, assess the respective values of the several parcels detained, and also damages for the detention. And the judgment is conditional; that the plaintiff recover the said goods, or (if they cannot be had) their respective values, and also damages for detaining them (*y*). (561)

A peculiar power, ancillary to the remedy by detinue, has recently been conferred upon a court of common law, the power of compelling restitution of a chattel which has been unlawfully detained—by distress, “till the defendant render such chattel,” or the power at the option of the plaintiff of “causing to be made of the defendant's goods the assessed value of such chattel” (*z*).

The action of trover or conversion originally lay for recovery of damages against such person as had found another's goods, and refused to deliver them on demand, * but converted them to his own use; from [*257] which finding and converting it was called an action of trover and conversion. By a fiction of law, however, an action of trover was

(*u*) F. N. B. 138.

(*v*) Bull. & L. Pl., 2nd ed. 271.

(*x*) See *Oliver v. Oliver*, 11 C. B. N. S. 139.

(*y*) Co. Entr. 170; Chitt. Forms, 9th ed. 255.

(*z*) 17 & 18 Vict. c. 125, s. 78. See 19 & 20

Vict. c. 97, s. 2.

(561) Detinue lies in every case in which the owner wishes to recover the specific property, whether it came into the possession of the defendant rightfully or wrongfully. *Oberfield v. Bullitt*, 1 Mo. 749; *Peirce v. Hill*, 9 Port. (Ala.) 151; *Bernard v. Herbert*, 3 Cranch's C. C. 346; *Dame v. Dame*, 43 N. H. 37. The gist of the action is the wrongful detention of property (*id.*); and it cannot, therefore, be maintained where the holding over was permissive, so long as that kind of possession continues. *Benje v. Creagh*, 21 Ala. 151. Nor can it be maintained after the destruction or death of the chattel sued for. *Caldwell v. Fenwick*, 2 Dana (Ky.), 332; *Lindsey v. Perry*, 1 Ala. 203.

To support the action the plaintiff must have a property, either general or special, in the chattel; if special it must grow out of an actual possession, or be coupled with an interest therein. *Ramsay v. Bancroft*, 2 Mo. 151. See *Boyle v. Townes*, 9 Leigh (Va.), 158; *Wade v. Edwards*, Cam. & N. (N. C.) 416; *Bell v. Hogan*, 1 Stew. (Ala.) 536; *Frierson v. Frierson*, 21 id. 549; *Berry v. Hale*, 2 Miss. (1 How.) 315. Demand before suit is necessary only for the purpose of entitling the plaintiff to damages for detention between the time of the demand and the commencement of the suit. *Jones v. Henry*, 3 Litt. (Ky.) 46; *Tunstall v. McClelland*, 1 Bibb (Ky.), 186; *Camaway v. McNeice*, Walk. (Mich.) 588; *Jones v. Green*, 4 Dev. & B. (N. C.) 354; *O'Neil v. Henderson*, 15 Ark. 235.

at length permitted to be brought against any man who had in his possession by any means the personal goods of another, and wrongfully sold or used them without the consent of the owner, or asserted dominion over them or refused to deliver them when demanded. And although the fact of a finding became immaterial, the plaintiff still suggested in his declaration that he had lost such goods, and that the defendant found them: a form which has been simplified by the first Common Law Procedure Act, s. 49, which enjoins that "the statement of losing and finding and bailment in actions for goods or their value" be omitted. The declaration in trover accordingly now alleges that "the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession" of his goods. To support this action the plaintiff must show a right of possession (a), and a right of property; he must also give proof of a conversion (b) by the defendant. Any man may take the goods of another into possession if he finds them; but no finder is allowed thus to acquire a property therein as against the absolute owner, and therefore he must not convert them to his own use, which the law presumes him to do if he refuses to restore them to the owner: for which reason such refusal alone is *prima facie* evidence of a conversion (c). A conversion being proved, the plaintiff * may in this action recover damages equal to the value of the [* 258] thing converted. (562)

(a) See *Meyerstein v. Barber*, L. R. 2 C. P. 661.

(b) As to the meaning of conversion, see *Burroughes v. Bayne*, 5 H. & N. 296; *Pillott v. Wilkinson*, 8 H. & C. 845.

(c) *Armory v. Delamirie*, 1 Stra. 504, shows that the finder of a jewel, though he does not by such finding acquire in it an absolute indefeasible property or ownership, has yet such a property in it as will entitle him to

keep it as against all save the rightful owner; and consequently it was there held that the finder might maintain trover for the jewel. In this case the evidence showed clearly that there had been a misappropriation of the jewel, and from it we gather that a special property in goods will, as against a wrong-doer, entitle the person having it to maintain trover. See also *Bridges v. Harknessworth*, 21 L. J. Q. B. 75.

(562) In trover the cause of action accrues upon the conversion. It is the conversion which is the gist of the action. *Kelsey v. Griswold*, 6 Barb. 436. The action being founded on a conjunct right of property and possession, any act which denies or is inconsistent with such right is a conversion. *Bristol v. Burt*, 7 Johns. 254. See *Webber v. Davis*, 44 Me. 147; *Brown v. Beason*, 24 Ala. 436; *Robinson v. Skipworth*, 28 Ind. 311; *Stickney v. Smith*, 5 Minn. 486; *Woodbury v. Long*, 8 Pick. (Mass.) 543; *Hotchkiss v. Hunt*, 49 Me. 213. So, if one legally in possession of the personal property of another misuse that property, it is a conversion, and the owner may immediately maintain trover. *Ripley v. Dolbier*, 6 Shep. (Me.) 382. See *Maguyer v. Hawthorn*, 2 Harr. (Del.) 71; *Chapin v. Siger*, 4 McLean, 378.

Where one induces another to enter into a contract and part with his property, either by duress of imprisonment, or duress *per minas*, the transaction is void, and no title passes; and a party who assumes the control of property, obtained by him in this way, is liable to the owner in trover without any previous demand. *Foshay v. Ferguson*, 5 Hill, 154. So, fraud in obtaining goods is held to dispense with a demand and refusal. *Tallman v. Turk*, 26 Barb. 167; *Luckey v. Roberts*, 25 Conn. 486. And it is only when the wrong-doer became, in the first instance, lawfully possessed of the goods, and there is no proof of an actual distinct conversion, that a demand and refusal are necessary as evidence of a conversion. *Kelsey v. Griswold*, 6 Barb. 436. See *Witherspoon v. Blewett*, 47 Miss. 570; *Munger v. Hess*, 28 id. 75; *Boyle v. Roche*, 2 E. D. Smith, 335; *Hardy v. Wheeler*, 56 Ill. 153.

If one has it within his power to deliver or to retain the article demanded, a demand and a refusal to deliver are held to constitute sufficient evidence of a conversion. *Bristol v. Burt*, 7 Johns. 254; *Kelsey v. Griswold*, 6 Barb. 436. A refusal may, however, be accompanied with such reasonable qualification as to furnish an excuse for retention, and then there is no conversion shown merely by proof of demand and refusal. *McEntee v. N. J. Steamboat Co.*, 45 N. Y. (6 Hand) 84; *McCormick v. Penn. Central R. R. Co.*, 49 N. Y. (4 Sick.) 803, 810. See *Magee v. Scott*, 9 Cush. (Mass.) 148; *Dietus v. Fuss*, 8 Md. 148.

As to the damage that may be done to things personal, while in the possession of the owner, as by hunting a man's deer, shooting his dogs, (563) poisoning his cattle, or in anywise taking from the value of any of his chattels, or making them in a worse condition than before, these are wrongs too obvious to need explication. I have only therefore to mention the remedies given by the law to redress them, which are in two shapes; by action of trespass, where the act is in itself immediately injurious to another's property, and by action on the case, where the act is in itself perhaps indifferent, and the injury only consequential (d), in either of which suits the plaintiff may recover damages in proportion to the injury which he proves that he has sustained. And it is not material whether the damage be done by the defendant himself, or his servants by his direction; for the action will lie against the master as well as against the servant (e). And if a man keeps a dog which does mischief, by worrying sheep, the owner must now answer for the consequences thereof, whether he knows of such evil habit or not, for "it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner" (f).

[* 259] This statute does not however apply where hurt is caused * to a human being by a ferocious animal, in which case the *scienter* must, where the animal is domesticated, be proved, though not so if the animal be *feræ naturæ* (g). (564)

(d) See, *ex. gr.*, *Mears v. London and South West. R. C.*, 11 C. B. N. S. 850. If the pledgee of a chattel deals with the pledge in a manner other than is allowed by law for the payment of his debt, an action on the case would lie against him for thus wrongfully disposing of the reversionary interest of the pledgor, but neither trover nor detinue would in the case supposed be maintainable, for each of these

actions assumes an immediate right to possession in the plaintiff. *Halliday v. Holgate*, L. R. 3 Ex. 299; *Donald v. Suckling*, L. R. 1 Q. B. 585.

(e) *Noy's Max.* c. 44.

(f) 28 & 29 Vict. c. 60, s. 1.

(g) See *Worth v. Gilling*, L. R. 2 C. P. 1; *Smith v. Great Eastern R. C.*, *Id.* 4; *May v. Burdett*, 9 Q. B. 101.

In general, the measure of damages in trover is the value of the goods at the time and place of conversion, with interest. *Moore v. Aldrich*, 25 Tex. 276; *Ripley v. Davis*, 15 Mich. 75; *Kennedy v. Strong*, 14 Johns. 128; *Clement v. Brown*, 30 Ill. 43; *Yater v. Mullen*, 24 Ind. 277; *Robinson v. Burrows*, 48 Me. 36; *McCormick v. Penn. Central R. R. Co.*, 49 N. Y. (4 Sick.) 803, 310; *Crumb v. Oaks*, 38 Vt. 566; *Park v. McDaniels*, 37 *id.* 594.

(563) Dogs have always been held by the American courts to be entitled to less legal regard and protection than more harmless and useful domestic animals. *Putnam v. Payne*, 13 Johns. 812; *Brown v. Carpenter*, 26 Vt. 638; *Woolf v. Chalker*, 31 Conn. 121; *Blair v. Forehand*, 100 Mass. 136, 141.

(564) Whoever keeps an animal accustomed to attack or bite mankind, with knowledge of its dangerous propensities, is *prima facie* liable to an action for damages at the suit of any person attacked or injured by the animal, without proof of any negligence or fault in the securing or taking care of it. The gist of such an action is the keeping of the animal after knowledge of its mischievous disposition. *Partlow v. Haggarty*, 35 Ind. 178; *Kelly v. Tilton*, 2 Abb. Ct. App. 495; S. C., 3 Keyes, 263. See *Smith v. Causey*, 22 Ala. 568; *Woolf v. Chalker*, 31 Conn. 121; *Kittredge v. Elliott*, 16 N. H. 77; *Wheeler v. Brant*, 23 Barb. 324; *Marsh v. Jones*, 21 Vt. 378; *Laverone v. Mangianti*, 44 Cal. 138; *Kertschacke v. Ludwig*, 28 Wis. 480. In the case of an injury caused by an animal *feræ naturæ*, knowledge of a mischievous disposition will be presumed from the nature of the animal. *Id.*

An owner of domestic animals is liable for injuries done by them while committing a trespass upon the premises of another person, although such owner has not notice of a mischievous propensity. The law imputes the trespass of the animal to its owner. *Stafford v. Ingersoll*, 3 Hill, 38; *Van Leuven v. Like*, 1 N. Y. (1 Comst.) 515; S. C., 4 Denio, 127; *Wells v. Howell*, 19 Johns. 335.

And here is noticeable the diversity of remedies which may sometimes present themselves for choice to one aggrieved, inasmuch as a particular ingredient essential for the maintenance of an action in one form, but not at all necessary to the maintaining of it in another, may at pleasure be discarded and put out of sight so as perchance to affect the form of action to be adopted and the evidence to be adduced on behalf of the plaintiff at the trial, and to cause a change in the mode of procedure. If a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser, and the proceeds of their sale received by him, we have seen that an action of trespass will lie for this injury against the trespasser, and if minded thus to sue, the complainant will declare that "the defendant seized and took his goods and carried away the same and converted them to his own use." The gist of the complaint when thus put forward obviously is the forcible and tortious taking of the chattel, the property of the plaintiff. But in the case supposed it is quite open to him to waive the element of force, and to sue in trover for the value of the goods, charging merely that the defendant converted them to his own use; or the plaintiff may bring his action in detinue, and complain of the detention of his goods, and possibly by availing himself of this latter remedy may compel their restitution (*h*). Further, the plaintiff might, under the circumstances supposed, maintain an action for money received by the defendant for his use.

The procedure by replevin, which the Mirror (*i*) ascribes to Glanvil, chief justice to King Henry II., is specially *appropriate for contesting the validity of a distress (though it lies for the wrongful taking of goods [* 260] and chattels under other circumstances (*k*)), the thing taken being redelivered to the owner, upon his giving security to try the legality of the distress, and to restore it if the right be adjudged against him. (565) Formerly, when the party distrained upon intended to dispute the

(*h*) *Ante*, p. 256.

(*i*) Chap. 2, s. 6.

(*k*) Per Lord Redesdale in *Shannon v.*

Shannon, 1 Sch. & Lef. 327; *Mellor v. Leather*, 1 E. & B. 619.

(565) Replevin was one of the most complicated of all the common-law actions. In the United States it is regulated and variously modified by statutes; and in many of the States it is the instrument used for the adjustment of all disputes relative to the ownership of personal property. The general rule has been stated to be, that replevin, though not confined to cases of distress, lies only for a tortious or unlawful taking of goods. *Pangburn v. Partridge*, 7 Johns. 140; *Hopkins v. Hopkins*, 10 id. 378; *Drummond v. Hopper*, 4 Harr. (Del.) 327; *Daggett v. Robbins*, 2 Blackf. (Ind.) 415; *Rector v. Chevalier*, 1 Mo. 345; *Vaiden v. Bell*, 8 Rand. (Va.) 448. But the prevailing rule now is, that replevin lies for the recovery of any personal chattel unlawfully detained from the owner, although the taking may not have been tortious. *Marston v. Baldwin*, 17 Mass. 606; *Baker v. Fales*, 16 id. 147; *Seaver v. Dingley*, 4 Greenl. (Me.) 306; *Waterman v. Matteson*, 4 R. I. 539; *Cullum v. Bevans*, 6 Harr. & J. (Md.) 469; *Weaver v. Lawrence*, 1 Dall. (Penn.) 156; *Stoughton v. Rappalo*, 3 Serg. & Rawle (Penn.) 562; *Arthur v. Wallace*, 8 Kan. 267. And upon this ground replevin is concurrent with the action of trover. *Eggleston v. Mundy*, 4 Mich. 295.

In New York, the "claim and delivery of personal property," under the Code, is a substitute for replevin, as it was previously regulated by the Revised Statutes. See 1 Wait's Pr. 708. So, in North Carolina, "claim and delivery" is a substitute for replevin. See *Hirsh v. Whitehead*, 65 N. C. 516. As modified by statute, replevin in Pennsylvania seems to be an action for damages (*Schofield v. Ferrers*, 46 Penn. St. 438. See *Lovett v. Burkhardt*, 44 id. 173); and it lies wherever one man claims goods in the possession of another. *Boyle v. Rankin*, 22 id. 168. In Ohio, it is wrongful detention, verified by affidavit, that gives the

right of the distress, he had no other process at the common law than by a writ of replevin, *replegiari facias* (l); which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice in respect of the matter in dispute in his own county court. This was, however, a tedious method of proceeding, the beasts or other goods being long detained from the owner to his great loss and damage (m). For which reason the statute of Marlbridge (n) directed that (without suing a writ out of the chancery) the sheriff immediately, upon plaint to him made, should proceed to replevy the goods. And, for the greater ease of the parties, it was further provided by statute 1 Ph. & M. c. 12, that the sheriff should appoint at least four deputies in each county, for the purpose of making replevins; and upon application either to the sheriff or one of his said deputies, security was to be given, in pursuance of the statute of Westm. 2, 13 Edw. 1, c. 2:—1. That the party replevying would pursue his action against the distrainer, for which purpose he put in *plegios de proseguendo*, or pledges to prosecute; and, 2. That if the right were determined against him, he would return the distress again, for which purpose he was also bound to find *plegios de retorno habendo*. Besides these pledges, the sufficiency of which was discretionary and at the peril of the

(l) F. N. B. 68.

(n) 52 Hen. 8, c. 21.

(m) 2 Inst. 139.

right of action. *Stats v. Jennings*, 14 Ohio St. 73. For further illustrations of the various modifications of the remedy in the different States, see *Kavanagh v. Phelps*, 36 Conn. 111; *Stevenson v. Taylor*, 2 Mich. N. P. 95; *Wheelock v. Cozens*, 6 How. (Mass.) 279; *Coit v. Waples*, 1 Minn. 134; *Phelan v. Bonham*, 4 Eng. (Ark.) 339; *Bryan v. Whitsett*, 39 Ga. 715; *Baer v. Martin*, 2 Cart. (Ind.) 229; *Woodward v. Grand Trunk Railway Co.*, 46 N. H. 524; *Clark v. Adair*, 3 Harr. (Del.) 113.

As to the property and possession necessary to maintain replevin the prevailing rule in American law is, that the plaintiff must have possession, or a right to immediate possession; and that such right, as against a wrong-doer, is sufficient to support the action without any reference to property or actual possession. *Moorman v. Quick*, 20 Ind. 67; *Noble v. Parkman*, 24 id. 414; *Berthold v. Fox*, 13 Minn. 501; *Shaddon v. Knott*, 2 Swan (Tenn.), 358; *Thomas v. Spofford*, 46 Me. 408; *Curd v. Wunder*, 5 Ohio St. 92. Modifications of this rule exist, however, in some of the States. See *Dodsworth v. Jones*, 4 Duer, 201; *Cummings v. McGill*, 2 Murph. (N. C.) 357; *Freshwater v. Nichols*, 7 Jones (N. C.), 251; *Broadwouter v. Darne*, 10 Mo. 277; *Gartside v. Nizon*, 43 id. 138; *Underwood v. White*, 45 Ill. 439; *Tomlinson v. Collins*, 20 Conn. 364. A servant, or one having charge of goods, cannot maintain replevin for them. *Harris v. Smith*, 3 Serg. & Rawle, 20. But the lender of a chattel, sold by the borrower, may maintain replevin against any one in possession. *Roland v. Gundy*, 5 Ohio, 202. And where a chattel is wrongfully detained the owner may assign his title, and his assignee may replevy the chattel whether he ever had possession of it or not. *Lazard v. Wheeler*, 22 Cal. 139.

In replevin there can be no recovery against one not in possession or control of the property. *Ramsdell v. Buswell*, 54 Me. 546; *Myers v. Credle*, 63 N. C. 504. But if one has control of property, although it is in the hands of another, replevin will lie (*Bradley v. Gamelle*, 7 Minn. 331); and it will lie against one or all the members of a firm when one is in possession claiming for all. *How v. Shaw*, 56 Me. 201.

Damages in replevin is a subject very generally regulated by statute in the different States. In the absence of any statutory regulation damages must be assessed according to the magnitude of the injury, agreeably to the rule of the common law. *Brus v. Learned*, 4 Mass. 616. See *Cable v. Dakin*, 20 Wend. 172; *McCabe v. Morehead*, 1 Watts & S. (Penn.) 513; *Schofield v. Ferrers*, 46 Penn. St. 438; *Cummings v. Gann*, 52 id. 484; *Weber v. Henry*, 16 Mich. 399; *Fret v. Vogel*, 40 Mo. 149; *Stevens v. Tinte*, 104 Mass. 332. Ordinarily the measure of damages is held to be the interest upon the value of the property from the time of the taking to the time of assessment. *Twinam v. Swart*, 4 Lans. 263.

sheriff, the statute 11 Geo. 2, c. 19, required that the officer, granting a replevin on a distress for rent, should take a bond with two sureties in a sum of *double the value of the goods distrained, conditioned to prosecute [* 261] the suit with effect and without delay, and for return of the goods; which bond was to be assigned to the avowant or person making cognizance, on request made to the officer; and, if forfeited, might be sued upon in the name of the assignee. The sheriff, on receiving such security, was immediately, by his officers, to cause the chattels taken in distress to be restored into the possession of the party distrained upon; who was then bound to bring his action of replevin with a view to testing the validity of the distress.

In this action the distrainer (the defendant) made avowry; that is, avowed taking the distress, and set forth the reason of it, as for rent in arrear, damage done, or other cause: or else he justified in another's right as his bailiff or servant, in which case he was said to make cognizance; that is, he acknowledged the taking, but insisted that such taking was legal, as he acted by the command of one who had a right to distrain; and on the truth and legal merits of this avowry or cognizance the cause was determined. If it were determined for the plaintiff; viz. that the distress was wrongfully taken; he kept the goods which he had already got into his own possession, and moreover recovered damages (*o*). But if the defendant prevailed by the default or nonsuit of the plaintiff, he was entitled to a writ *de retorno habendo*, whereby the goods or chattels (which had been distrained and then replevied) were returned again into his custody; to be sold or otherwise disposed of, as if no replevin had been made. In virtue, however, of the statute 17 Car. 2, c. 7, if the plaintiff were nonsuit before issue joined, then upon suggestion made on the record, or if judgment were given against him on demurrer, then, without any such suggestion, the defendant might have had a writ to inquire into the value of the distress by a jury, and might have recovered the amount of it in damages, if less than *the [* 262] arrear of rent; or, if more, then so much as was equal to such arrear, with costs: or, if the nonsuit were after issue joined, or if a verdict were had against the plaintiff, then the jury impaneled to try the cause were to assess such arrears for the defendant: and if (in any of these cases) the distress were insufficient to answer the arrears distrained for, the defendant might have taken a further distress.

According to the policy of our ancient law, as the end of a distress is to compel the party distrained upon to satisfy the debt or duty owing from him, this end was thought to be as well answered by the giving of sufficient sureties in the manner above mentioned as by retaining the distress, which might frequently occasion great and needless inconvenience to the owner. The soundness of this policy is still recognized, although the practice connected with replevin has, by recent statutes, been altered and improved.

Any action of replevin may now be brought in the county court (*p*), or in a superior court; the powers and responsibilities of the sheriff with respect to replevin bonds and replevins have ceased; and the registrar of the county court of the district in which any distress subject to replevin may be taken is empowered to approve of replevin bonds, to grant replevins, and to issue all necessary process in relation thereto (*q*).

(*o*) F. N. B. 69.

(*p*) 19 & 20 Vict. c. 108, s. 120, extended by 23 & 24 Vict. c. 126, s. 22.

(*q*) 19 & 20 Vict. c. 108, ss. 63, 64.

If the replevisor, or person replevying goods, elect to commence proceedings in a county court, he must do so in the court of the district in which the distress was taken (*r*), and must at the time of replevying give security conditioned to commence an action of replevin against the distrainer within one month from the date of the security, to prosecute such action with effect and without delay, and to make return of the goods, if a return thereof shall be [* 263] *adjudged (*s*). On entering the plaint, the plaintiff will have to specify and describe, in a statement of particulars, the cattle, or the several goods and chattels taken under the distress, and of the taking of which he complains (*t*). An action of replevin commenced in the county court may, however, be thence removed by the defendant into a superior court by *certiorari*, security, to be approved of by the master, being given for such amount, not exceeding 150*l*., as he shall think fit, the condition of such security being that the defendant will defend the action with effect, and, unless the replevisor discontinue or do not prosecute it, or become nonsuit therein, will prove before the court into which the action is removed, that he (the defendant) had good ground for believing, either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that the rent or damage in respect of which the distress was taken exceeded 20*l*. (*u*).

If the defendant in replevin, anticipating that the title to the premises in respect whereof the distress was made will really come in question on the trial in the county court, is desirous of removing the action into a superior court, he should proceed to do so in the manner above described, for otherwise the county court may entertain the case. Indeed, the county court has now jurisdiction to try any action in which the title to any corporeal or incorporeal hereditament shall come in question where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed 20*l*. yearly, or in case of an easement or licence where neither the value nor reserved rent of the lands, tenements, or hereditaments in respect of which the easement or licence is claimed, or on, through, over, or under which such easement or licence is claimed shall exceed such sum (*x*).

[* 264] *The action of replevin is tried in a summary way, either with or without a jury (*y*), as other actions are tried in the county court.

Where the distress is for rent, and the defendant succeeds in the action, if the defendant require, the judge or the jury will find the value of the goods distrained, and if the value be less than the amount of rent in arrear, judgment will be given for the amount of such value, but if the amount of the rent in arrear be less than the value so found, judgment will be given for the amount of such rent, and may be enforced in like manner as any other judgment of the court (*z*).

Where the distress is for damage-feasance, and the defendant is entitled to judgment for a return, if the plaintiff require, the judge or the jury will find the amount of the damage sustained by the defendant, and judgment will be given in favour of the defendant, in the alternative, for a return, or for the amount of the damage so found (*a*).

(*r*) 9 & 10 Vict. c. 95, s. 120.

(*s*) 19 & 20 Vict. c. 108, s. 66.

(*t*) Rules of 1867, reg. 280.

(*u*) 19 & 20 Vict. c. 108, s. 67.

(*x*) 80 & 81 Vict. c. 142, s. 12.

(*y*) Reg. 261.

(*z*) Reg. 262.

(*a*) Reg. 263.

An appeal lies in replevin from the county court where the amount of rent or damage exceeds 20*l.* (*b*), or where the title comes in question, or, by leave of the judge, in any other case (*c*).

If the replevisor elect to commence his action in a superior court (which in such case will have power to hear and determine the same), he must, at the time of replevying, give security, to be approved of by the registrar, the condition of such security being that the party giving it will commence an action of replevin against the distrainer in the court specified within one week from the date thereof, and will prosecute such action with effect and without delay, and unless judgment therein be obtained by default, will "prove before such superior court that he had good ground for believing either that the title *to some corporeal or incorporeal hereditament, or to some toll, [*265] market, fair, or franchise, was in question, or that such rent or damage exceeded 20*l.*," and will make return of the goods, if a return thereof be adjudged (*d*). Should the plaintiff succeed in such action, he retains the goods replevied to him, together with small damages for their detention; whereas, if the defendant succeeds, he will be entitled to a return of the goods, and also, under the stat. 17 Car. 2, c. 7, already noticed (*e*), to his rent and costs. And thus much for replevin, which finishes our inquiries into such wrongs as may be offered to personal property, with their respective remedies by action.

* CHAPTER XI.

[*266]

JURISDICTION OF SUPERIOR COURTS OF LAW.

WRONGS TO REAL PROPERTY.

WE have now to consider such wrongs as affect that species of property which the laws of England have denominated real; they are usually of a more substantial and permanent nature than those which affect the more transitory rights attaching to chattels personal.

Wrongs affecting real rights are principally ouster or dispossession, trespass, and nuisance. These we shall proceed to notice in the order indicated, and, as occasion may arise, will specify some other wrongs not exactly referable to any one of the foregoing heads, yet, by no means, unimportant.

Ouster, or dispossession, is a wrong or injury that carries with it the amotion of possession: for thereby the wrong-doer gets into the actual occupation of land or realty, and obliges its rightful owner to seek his legal remedy, in order to get possession of it, and also to recover damages for the injury sustained. And here the reader will distinguish between the right of possession and the right of property in relation to land, hereditaments and tenements; for this distinction is material with a view to discerning the classification and nature of some real actions, now abolished, at which we purpose very briefly and cursorily to glance.

(b) 19 & 20 Vict. c. 108, s. 68; 23 & 24 Vict. c. 126, s. 22.

(c) 30 & 31 Vict. c. 142, s. 13.

(d) 19 & 20 Vict. c. 108, s. 65.

(e) *Ante*, p. 261.

If the replevisor, or person replevying goods, elect to commence proceedings in a county court, he must do so in the court of the district in which the distress was taken (*r*), and must at the time of replevying give security conditioned to commence an action of replevin against the distrainer within one month from the date of the security, to prosecute such action with effect and without delay, and to make return of the goods, if a return thereof shall be [*263] *adjudged (*s*). On entering the plaint, the plaintiff will have to specify and describe, in a statement of particulars, the cattle, or the several goods and chattels taken under the distress, and of the taking of which he complains (*t*). An action of replevin commenced in the county court may, however, be thence removed by the defendant into a superior court by *certiorari*, security, to be approved of by the master, being given for such amount, not exceeding 150*l.*, as he shall think fit, the condition of such security being that the defendant will defend the action with effect, and, unless the replevisor discontinue or do not prosecute it, or become nonsuit therein, will prove before the court into which the action is removed, that he (the defendant) had good ground for believing, either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that the rent or damage in respect of which the distress was taken exceeded 20*l.* (*u*).

If the defendant in replevin, anticipating that the title to the premises in respect whereof the distress was made will really come in question on the trial in the county court, is desirous of removing the action into a superior court, he should proceed to do so in the manner above described, for otherwise the county court may entertain the case. Indeed, the county court has now jurisdiction to try any action in which the title to any corporeal or incorporeal hereditament shall come in question where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed 20*l.* yearly, or in case of an easement or licence where neither the value nor reserved rent of the lands, tenements, or hereditaments in respect of which the easement or licence is claimed, or on, through, over, or under which such easement or licence is claimed shall exceed such sum (*x*).

[*264] *The action of replevin is tried in a summary way, either with or without a jury (*y*), as other actions are tried in the county court.

Where the distress is for rent, and the defendant succeeds in the action, if the defendant require, the judge or the jury will find the value of the goods distrained, and if the value be less than the amount of rent in arrear, judgment will be given for the amount of such value, but if the amount of the rent in arrear be less than the value so found, judgment will be given for the amount of such rent, and may be enforced in like manner as any other judgment of the court (*z*).

Where the distress is for damage-feasance, and the defendant is entitled to judgment for a return, if the plaintiff require, the judge or the jury will find the amount of the damage sustained by the defendant, and judgment will be given in favour of the defendant, in the alternative, for a return, or for the amount of the damage so found (*a*).

(*r*) 9 & 10 Vict. c. 95, s. 120.
 (*s*) 19 & 20 Vict. c. 108, s. 66.
 (*t*) Rules of 1867, reg. 260.
 (*u*) 19 & 20 Vict. c. 108, s. 67.

(*x*) 80 & 81 Vict. c. 142, s. 12.
 (*y*) Reg. 261.
 (*z*) Reg. 262.
 (*a*) Reg. 268.

An appeal lies in replevin from the county court where the amount of rent or damage exceeds 20*l.* (*b*), or where the title comes in question, or, by leave of the judge, in any other case (*c*).

If the replevisor elect to commence his action in a superior court (which in such case will have power to hear and determine the same), he must, at the time of replevying, give security, to be approved of by the registrar, the condition of such security being that the party giving it will commence an action of replevin against the distrainer in the court specified within one week from the date thereof, and will prosecute such action with effect and without delay, and unless judgment therein be obtained by default, will "prove before such superior court that he had good ground for believing either that the title *to some corporeal or incorporeal hereditament, or to some toll, [*265] market, fair, or franchise, was in question, or that such rent or damage exceeded 20*l.*," and will make return of the goods, if a return thereof be adjudged (*d*). Should the plaintiff succeed in such action, he retains the goods replevied to him, together with small damages for their detention; whereas, if the defendant succeeds, he will be entitled to a return of the goods, and also, under the stat. 17 Car. 2, c. 7, already noticed (*e*), to his rent and costs. And thus much for replevin, which finishes our inquiries into such wrongs as may be offered to personal property, with their respective remedies by action.

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(b) 19 & 20 Vict. c. 108, s. 68; 23 & 24 Vict. c. 126, s. 22.

(c) 30 & 31 Vict. c. 142, s. 18.

(d) 19 & 20 Vict. c. 108, s. 65.

(e) *Ante*, p. 261.

In the times of our Saxon ancestors, the right of possession seems only to have been recoverable by writ of *entry (a), which was commonly brought where the tenant, though not entitled, had entered, without fraud or tort, into possession of land, as by the deed or consent of one who himself either came into possession of such land unlawfully, or had but a particular or defeasible estate in it. This writ was termed a writ of entry because it not only spoke of the entry of the tenant, but likewise showed for what reason the possession ought not to be detained from the demandant (b). The possessory action thus initiated was usually brought in the county court; and we may observe that the proceedings in such an action were not then so tedious when that court was held, and process issued from it and was returnable therein at the end of every three weeks, as they became after the Conquest, when all causes were drawn into the king's courts, and process issued only from term to term; which was found exceedingly dilatory, being at least four times as slow as it had before been.

And hence a new remedy was invented in many cases, to do justice to the people, and to determine the right to the possession of land in the proper county, and by the king's judges. This was the remedy by assize, which was called by statute Westminster 2, 13 Edw. 1, c. 24, *festinum remedium*, in comparison with that by a writ of entry; it not admitting of many dilatory pleas and proceedings, to which other real actions were subject.

The writ of assize is said to have been invented by Glanvil, chief justice to Henry II. (c); and, if so, may have owed its introduction to the parliament held at Northampton in the twenty-second year of that prince's reign; when justices in eyre were appointed to go round the kingdom in order to take these assizes: and the assizes themselves were clearly pointed out and described (d). As *writ of entry was a real action, which disproved the title of the tenant by showing the unlawful commencement of his possession; so an assize was a real action, which proved the title of the demandant merely by showing his or his ancestor's possession (f); and these two remedies were in other respects so much alike, that a judgment or recovery in one of them was a bar against the other; so that when a man's possession had been once established by either of these possessory actions, it could never have been disturbed by the same antagonist in any other of them.

The word assize, derived by Sir Edward Coke (g) from the Latin *assideo*, to sit together, signified originally, the jury who tried the cause, and sat together for that purpose. By a figure it was afterwards made to signify the court or jurisdiction, which summoned this jury together by a commission of assize, or *ad assisus capiendas*; and hence the judicial assemblies held by commission from the crown, as well to take writs of assize as to try causes at *nisi prius*, were termed in common speech the assizes. By another somewhat similar figure, the name assize was also applied to the action for recovering possession of land: for the reason, says Littleton (h), why such writs at the beginning were

(a) Gilb. Ten. 42.

(b) Booth, Real Actions, 2nd ed. 172.

(c) Mirror, c. 2, s. 25.

(d) Id. s. 9. *Si dominus feodi negat hæredibus defuncti saisinam ejusdem feodi, justitii domini regis faciant inde fieri recognitionem per xii legales homines, qualem saisinam defunctus inde habuit, die quâ fuit vivus et mortuus; et, sicut recognitum fuerit, ita hæredi-*

bus ejus restituant. S. 10. *Justitii domini regis faciant fieri recognitionem de dissaisinis factis super assisam, a tempore quo dominus rex venit in Angliam proxime post pacem factam inter ipsum et regem filium suum* (Spelm. Cod. 330).

(f) Finch, L. 284.

(g) 1 Inst. 153.

(h) S. 234.

called assizes, was, that in them the sheriff was ordered to summon a jury, or assize; which was not expressed in any other original writ (i).

This remedy, by writ of assize, was only applicable to two species of injury by ouster, viz. abatement (k), and a *novel (or recent) disseisin (l). [*269] If the abatement happened upon the death of the demandant's father or mother, brother or sister, uncle or aunt, nephew or niece, the remedy was by an assize of *mort d'ancestor*. The writ directed the sheriff to summon a jury or assize, who were to view the land in question, and recognise whether such ancestor were seised thereof on the day of his death, and whether the demandant were the next heir: soon after which the judges came down by the king's commission to take the recognition of assize: when, if these points were found in the affirmative, the law immediately transferred the possession from the tenant to the demandant.

[*270] * In an assize of *novel* (or recent) *disseisin* (m), as in that of *mort d'ancestor* just mentioned, the demandant's possession must have been shown. In this action a complaint was made by the demandant of the disseisin committed, in terms of direct averment; whereupon the sheriff was commanded to re seize the land and all the chattels thereon, and keep the same in his custody till the arrival of the justices of assize; and in the meantime to summon a jury to view the premises in question, and make recognition of the assize before the justices. At which time the tenant might plead either the general issue or any special plea. And if, upon the general issue, the recognitors found an actual seisin in the demandant, and his subsequent disseisin by the tenant; he had judgment to recover his seisin, and damages for the injury sustained: this being the only case in which damages were recoverable in a possessory action at the common law (n); the tenant being in other cases allowed to retain the intermediate profits of the land, to enable him to perform the feudal services appertaining to it; though costs and damages were annexed to

(i) Co. Litt. 159.

(k) The term "abatement" was a figurative expression to denote that the rightful possession or freehold of the heir or devisee had been overthrown by the intervention of a stranger. An abatement being where a person had died seised of an inheritance, and before the heir or devisee entered, a stranger having no right of entry got possession of the freehold: this entry of him was called an abatement, and he himself was denominated an abator. Finch, L. 195.

Such abatement of a freehold was somewhat similar to an immediate occupancy in a state of nature, which is effected by taking possession of the land the same instant that the prior occupant by his death relinquishes it. But this, however agreeable to natural justice, considering man merely as an individual, is diametrically opposed to the law of society, and particularly to the law of England: which, for the preservation of public peace, has prohibited as far as possible all acquisitions by mere occupancy: and has directed that lands, on the death of the present possessor, should immediately vest either in some person, expressly named and appointed by the deceased, as his devisee; or, on default of such appointment, in such one of his next

relations as the law has selected and pointed out as his natural representative or heir. The entry therefore of a mere stranger by way of intervention between the ancestor and heir or person next entitled, which kept the heir or devisee out of possession, was regarded as one of the highest injuries to the rights of real property.

(l) Disseisin is a wrongful putting out of him who is seised of the freehold. Disseisin may be effected either in corporeal or incorporeal inheritances. Disseisin of a thing corporeal, as of a house, or land, is by entry and actual dispossession of the freehold; as if a man enters either by force or fraud into the house of another, and turns, or at least keeps him out of possession. Disseisin of an incorporeal hereditament cannot be an actual dispossession: for the subject itself is neither capable of actual bodily possession, nor dispossession; but is in general nothing more than a disturbance of the owner in the means of coming at, or enjoying it.

(m) Which name was originally given to this proceeding, because the disseisin must have been since the last *eyre* or circuit of the justices, which happened once in seven years, otherwise the action was gone.

(n) Bract. 187; Stat. Maribr. c. 16.

many other possessory actions by the statutes of Marlbridge, 52 Hen. 3, c. 16. and of Gloucester, 6 Edw. 1, c. 1.

In these possessory actions there was a time of limitation settled, beyond which no man should avail himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary. For, if he were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance, to recover the possession merely; both to punish his neglect (*nam leges vigilantibus, non dormientibus subveniunt*), and also because [*271] it was presumed that the supposed wrongdoer had * in such a length of time procured a legal title, otherwise he would sooner have been sued.

By these several possessory remedies the right of possession might formerly have been restored to him who had been unjustly deprived thereof. But the right of possession (though it carries with it a strong presumption) is not always conclusive evidence of the right of property, which may subsist in another man. For, as one man may have the possession, and another the right of possession, which was recoverable by a possessory action; so one man might have had the right of possession, and so might not have been liable to eviction by any possessory action, and another might have had the right of property, which could not have been otherwise asserted than by the great and final remedy of writ of right (*o*), or such correspondent writs as were in the nature of a writ of right.

The writ of right was in its nature the highest writ in the law (*p*), and lay only for an estate in fee-simple, and not for him who had a less estate. This writ lay concurrently with any other real action, in which an estate of fee-simple might be recovered; and also lay after it, being as it were an appeal to the mere right, when judgment had been had as to the possession in an inferior possessory action (*q*). But though a writ of right might have been brought, where the demandant was entitled to the possession, yet it rarely was advisable to bring it in such a case, since a more expeditious and easy remedy was to be had, without meddling with the property, by proving the demandant's own, or his ancestor's, possession, and an illegal ouster, in one of the possessory actions. But in case the right of possession had been lost by length of time, or by judgment against the true owner in one of these inferior suits, there was no other [*272] choice. The writ of right was * then the only remedy that could be had, and was of so forcible a nature, that it overcame all obstacles, and cleared all objections that might have arisen to cloud and obscure the title, for, after issue once joined in a writ of right, the judgment was absolutely final; so that a recovery had in this action might have been pleaded in bar of any other claim or demand.

The pure, proper, or mere writ of right lay only, we have said, to recover land in fee-simple, unjustly withheld from the true proprietor. But there were also some other writs which were said to be in the nature of a writ of right.

The writ of right was brought, according to circumstances, either in the court baron of the lord of whom the lands were holden, or in the king's court;

(*o*) This writ when brought by the issue in tail, or by the reversioner or remainderman after the determination of an estate tail, was called a formedon.

(*p*) F. N. B. 1.
(*q*) *Id.* 1, 5.

and in the progress of this action the demandant alleged some seisin of the lands and tenements in himself, or else in some person under whom he claimed, and then derived the right from the person so seised to himself; to which the tenant might have answered by denying the demandant's right, and averring that he had more right to hold the lands than the demandant had to demand them: and, this right of the tenant being shown, it then put the demandant upon the proof of his title: in which, if he failed, or if the tenant had shown a better, the demandant and his heirs were perpetually barred of their claim; but if the demandant could make it appear that his right was superior to the tenant's, he recovered the land against the tenant and his heirs for ever; though even this writ of right, however superior to any other, could not have been sued out at any distance of time.

Real actions for the recovery of land having, long before the passing of the statute 3 & 4 Will. 4, c. 27, become almost entirely disused (*r*), were by section 36 of that act * altogether abolished (*s*); so that the action of ejectment is now the only direct mode of procedure for trying the title to real property, although trespass is sometimes made indirectly available for that purpose. (566)

(*r*) There is a modern instance of a writ of right in *Davies v. Lowndes*, 1 Bing. N. C. 597, where the form of the proceedings may be seen. (*s*) The writs of dower *unde nihil habet*, and right of dower, however, are excepted in the above section.

(566) None of the common-law actions for the recovery of land are retained in the United States, except the action of *ejectment*, or as it is sometimes termed, *writ of entry*, and *real action*. And by statutes, in most of the States, the proceedings in this action have been so simplified and divested of all cumbrous fictions as to leave but slight resemblance to the ancient form of the remedy. As to the nature of these changes, the statutes of the particular State should be consulted on the subject.

Among the established rules universally applicable in the several States is the one that the plaintiff must show a *possessory right*, in order to maintain the action. *Williams v. Hartshorn*, 80 Ala. 211; *Heffner v. Bets*, 32 Penn. St. 376; *Batterton v. Yoakum*, 17 Ill. 288. He must recover on the strength of his own title, and cannot, in general, rely upon the weakness of the defendant's title. *Webster v. Hill*, 38 Mo. 78; *Bruce v. Mitchell*, 39 id. 390; *State v. Stringfellow*, 2 Kan. 263; *Stuart v. Dutton*, 39 Ill. 91; *Stehman v. Crull*, 28 Ind. 436; *Woodworth v. Fulton*, 1 Cal. 295; *Hammond v. Inloes*, 4 Md. 138; *Cunningham v. Dean*, 33 Miss. 46; *Layman v. Whiting*, 20 Barb. 559. Where both parties claim title from the same person the plaintiff is not bound to establish the absolute title of that person; but proof of prior possession in him and the plaintiff is sufficient. *Pollock v. Maison*, 41 Ill. 516; *Turner v. Reynolds*, 28 Penn. St. 199; *Merchants' Bank v. Harrison*, 39 Mo. 433; *Paschal v. Acklin*, 27 Tex. 173; *Gantt v. Cowan*, 27 Ala. 582; *Miller v. Surls*, 19 Ga. 331.

The general rule, that an *equitable estate* will not sustain ejectment (see *Thompson v. Lyon*, 33 Mo. 219; *Emeric v. Penniman*, 26 Cal. 122; *Peck v. Newton*, 46 Barb. 178), has been extensively modified in the United States. Thus, under the practice in California, possession, with an equitable title, is as good as a legal title. *Morrison v. Wilson*, 13 Cal. 494. See *Cadis v. Majors*, 33 Cal. 283; *Seaton v. Son*, 32 id. 481. And so in Pennsylvania. *Myers v. Hill*, 46 Penn. St. 9; *Deitler v. Miehler*, 37 id. 82. An equitable title also constitutes a defense to the action of ejectment in many of the States. See, as to New York, *Carpenter v. Otley*, 2 Lans. 451; *Dewey v. Hoag*, 15 Barb. 365; Wisconsin, *Prentiss v. Brewer*, 17 Wis. 635; Missouri, *Hayden v. Stewart*, 27 Mo. 286; Kentucky, *Petty v. Malier*, 15 B. Monr. 591; Iowa, *Penny v. Cook*, 19 Iowa, 538. See *Blun v. Robertson*, 24 Cal. 146; *Downer v. Smith*, id. 124.

The numerous technicalities in pleading, which incumbered the old action of ejectment, have all been swept away by statutory enactments; and the action is now, in most cases, commenced by filing a declaration or complaint against the party in possession, generally

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In these possessory actions there was a time of limitation settled, beyond which no man should avail himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary. For, if he were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance, to recover the possession merely; both to punish his neglect (*nam leges vigilantibus, non dormientibus subveniunt*), and also because [*271] it was presumed that the supposed wrongdoer had * in such a length of time procured a legal title, otherwise he would sooner have been sued.

By these several possessory remedies the right of possession might formerly have been restored to him who had been unjustly deprived thereof. But the right of possession (though it carries with it a strong presumption) is not always conclusive evidence of the right of property, which may subsist in another man. For, as one man may have the possession, and another the right of possession, which was recoverable by a possessory action; so one man might have had the right of possession, and so might not have been liable to eviction by any possessory action, and another might have had the right of property, which could not have been otherwise asserted than by the great and final remedy of writ of right (*o*), or such correspondent writs as were in the nature of a writ of right.

The writ of right was in its nature the highest writ in the law (*p*), and lay only for an estate in fee-simple, and not for him who had a less estate. This writ lay concurrently with any other real action, in which an estate of fee-simple might be recovered; and also lay after it, being as it were an appeal to the mere right, when judgment had been had as to the possession in an inferior possessory action (*q*). But though a writ of right might have been brought, where the demandant was entitled to the possession, yet it rarely was advisable to bring it in such a case, since a more expeditious and easy remedy was to be had, without meddling with the property, by proving the demandant's own, or his ancestor's, possession, and an illegal ouster, in one of the possessory actions. But in case the right of possession had been lost by length of time, or by judgment against the true owner in one of these inferior suits, there was no other [*272] choice. The writ of right was * then the only remedy that could be had, and was of so forcible a nature, that it overcame all obstacles, and cleared all objections that might have arisen to cloud and obscure the title, for, after issue once joined in a writ of right, the judgment was absolutely final; so that a recovery had in this action might have been pleaded in bar of any other claim or demand.

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(*p*) F. N. B.
(*q*) Id.

judgment to recover his term and damages; and might, in consequence, have had a writ of possession, which the sheriff executed by delivering to him the undisturbed and peaceable possession of his term.

Such was the regular mode of bringing an action of ejectment; but, as much trouble and formality were found to attend the actual making of the lease, entry, and ouster, a more easy method of trying a title by ejectment, where there was an actual tenant or occupier of the premises in dispute, was invented by the Lord Chief Justice Rolle (*t*), who sat in the court of upper bench (*u*) during the exile of King Charles II. This new method entirely depended upon a string of legal fictions; no actual lease was made, there was no actual entry by the plaintiff, nor actual ouster by the defendant; but these were merely ideal, for the sole purpose of trying the title. To this end, in the proceedings a lease for a term of years was stated to have * been made, [* 275] by him who claimed title, to the plaintiff who brought the action, as by John Rogers to Richard Smith, it was also stated that Smith the lessee entered; and that the defendant William Stiles, who was called the casual ejector, ousted him; for which ouster he brought the action. As soon as this action had been brought, and the complaint had been fully stated in the declaration, Stiles, the casual ejector, or defendant, sent a written notice to the tenant in possession of the lands, as George Saunders, informing him of the action brought by Richard Smith, and transmitting him a copy of the declaration: withal assuring him that he, Stiles the defendant, had no title at all to the premises, and should make no defence; and therefore advising the tenant to appear in court and defend his own title: otherwise he, the casual ejector, would suffer judgment to be had against him, and thereby the actual tenant Saunders would be turned out of possession. On receipt of this friendly caution, if the tenant in possession did not within a limited time apply to the court to be admitted a defendant in the stead of Stiles, he was supposed to have no right at all; and, upon judgment being had against Stiles the casual ejector, Saunders the real tenant would have been turned out of possession by the sheriff.

But, if the tenant in possession applied to be made a defendant, it was allowed him upon this condition; that he should enter into a rule of court to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action; viz., the lease of Rogers the lessor, the entry of Smith the plaintiff, and his ouster by Saunders, himself, now made the defendant instead of Stiles: which requisites being wholly fictitious, had the defendant put the plaintiff to prove them, he must of course have been nonsuited for want of evidence; but by such stipulated confession of lease, entry, and ouster, the trial proceeded upon the merits of the title only. This done, the declaration was altered by inserting the name of George Saunders * instead [* 276] of William Stiles, and the cause went to trial under the name of Smith (the plaintiff), on the demise of Rogers (the lessor), against Saunders, the new defendant. And therein the lessor of the plaintiff was bound to make out a clear title, otherwise his fictitious lessee could not have obtained judgment to have possession of the land for the term supposed to have been granted. But, if the lessor made out his title in a satisfactory manner, then judgment and a writ of possession went for Richard Smith the nominal plain-

(*t*) Styl. Prac. Reg. 108 (edit. 1657).

(*u*) *Ante*, p. 118 (*s*).

tiff, who by this trial had proved the right of John Rogers, his supposed lessor. Yet, to prevent the fraudulent recovery of the possession of land, by collusion with the tenant thereof, a tenant was obliged, by a provision (*x*) now repealed (*y*) of the stat. 11 Geo. 2, c. 19, on pain of forfeiting three years' rent, to give notice to his landlord, when served with any declaration in ejectment; and the landlord might, by leave of the court, have been made a co-defendant to the action, in case the tenant himself appeared to it (*z*); or, if he made default, though judgment must then have been signed against the casual ejector, yet execution would have been stayed in case the landlord applied to be made a defendant, and entered into the common rule; a right which indeed the landlord had long before the provision of this statute (*a*). But, if the new defendants, whether landlord or tenant, or both, after entering into the common rule, failed to appear at the trial, and to confess lease, entry, and ouster, the plaintiff, Smith, must indeed have been there nonsuited, for want of proving those requisites (*b*); but judgment would nevertheless in the end have been entered against the casual ejector Stiles; for the condition on which Saunders, or his landlord, was admitted a defendant had been broken, and [*277] *therefore the plaintiff was put again in the same situation as if he never had appeared at all; in consequence of which (as we have seen) judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out Saunders, and delivered possession to Smith.

In order to complete the remedy by ejectment, an action of trespass lay, after a recovery therein, for the mesne profits which the tenant in possession had wrongfully received.

The procedure in ejectment has, by the Common Law Procedure Act, 1852, been much simplified and improved. Under the provisions of this statute (*c*) the action now commences by a writ—directed to the persons in possession of the premises sought to be recovered by name, and generally to “all persons intitled to defend the possession” of the property claimed—which is required to be described with reasonable certainty in the writ.

The writ of ejectment (*d*) commands the parties to whom it is directed, or such of them as deny the alleged title of the claimant, within a certain period, viz., sixteen days, after service of the writ to appear in court, to defend either for the whole or for part of the premises in question; the writ further notifies to the defendant (if there be only one), that in default of putting in an appearance judgment may be signed, and he may be turned out of possession. This writ must be indorsed with the address of the attorney issuing it, or (if it were issued by the plaintiff in person) of the plaintiff. It remains in force for three calendar months, and must be served upon the person in possession [*278] of the premises (*e*). Should such person, however, hold as *tenant merely, he must, under a penalty of forfeiting the value of three

(*x*) S. 12.

(*y*) See 30 & 31 Vict. c. 59.

(*z*) 11 Geo. 2, c. 19, s. 13, repealed *ut supra*.

(*a*) Styl. Pract. Reg. 108, 111, 265.

(*b*) An exception to this was created in favour of landlords by the repealed provision 1 Geo. 4, c. 87, s. 2.

(*c*) Ss. 168—221.

(*d*) See the form of this writ, C. L. Proc. Act, 1852, Sched. B., No. 13.

(*e*) In the case of what is called a “vacant possession,” i. e. where the premises are wholly deserted and void, the writ must be served “by posting a copy thereof upon the door of the dwelling-house or other conspicuous part of the property” sought to be recovered; s. 170.

As to the ordinary service of a writ, *post* chap. xii.

years' improved or rack rent of such premises, forthwith give notice that has been so served to his landlord. When notice has been thus given, the landlord will, by leave of the court or a judge, be allowed to appear and defend on filing an affidavit showing that he is in possession of the land in question either by himself or his tenant (*f*), and on entering an appearance the landlord will have to state expressly that he appears as landlord, in which case he will be at liberty to set up any available and suitable defence to the action.

If, when an appearance has been entered in an action of ejectment, the claimant suffers the time ordinarily allowed for going to trial after issue joined (*g*) to elapse, the defendant in ejectment may give twenty days' notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice, and if the claimant neglects to proceed to trial in pursuance of such notice, and the time for going to trial be not extended by the court or a judge, the defendant may sign judgment and recover the costs of his defence (*h*).

Assuming that the tenant in possession appears to the action within the time appointed (*i*), the issue may at once be made ~~without~~ without any pleadings (*k*); particulars of the claim and defence, if any, being annexed to the record by the claimant (*l*). The trial upon the issue raised between * the parties will then take place in the same manner as in other [* 279] actions (*m*); and the question to be tried and decided between the claimant of the land and the defendant will be "whether the statement in the writ of the title of the claimant is true or false, and, if true," and there be several claimants, "then which of the claimants is entitled, and whether to the whole or part, and if to part, then to which part of the property in question" (*n*). Moreover, it is competent to any one in possession of land actually or constructively to come in and defend his possession, and to contest the title to be put forward at the trial by the plaintiff, either altogether, or as regards a part only of the premises mentioned in the writ (*o*), and the issue will be restricted accordingly.

If at the trial the defendant appears, and the claimant does not appear, the claimant will be nonsuited — if the claimant appears, and the defendant does not appear, the claimant will be entitled to recover without any proof of his title (*p*). Further, if the title of the claimant shall appear to have existed as alleged in the writ, and at the time of service thereof, but it shall also appear to have expired before the time of trial, the claimant will notwithstanding be entitled to a verdict according to the fact that he was so entitled at the time of bringing the action and serving the writ, and to a judgment for his costs of suit (*q*). If the jury find for the claimant, judgment may then be signed (*r*),

(*f*) S. 173. By sect. 176 of the Act, the court or a judge has power "to strike out or confine appearances and defences set up by persons not in possession by themselves or their tenants."

(*g*) *Post*, Chap. xii.

(*h*) S. 202.

(*i*) S. 171.

(*k*) S. 178. As there is no plea (save to the jurisdiction) in ejectment, it follows that an equitable defence under the C. L. Proc. Act, 1854, s. 83, is not pleadable in such action:

Neave v. Avery, 16 C. B. 838. By "consent of the parties, and by leave of a judge, a special case may be stated, according to the practice heretofore used" (s. 179).

(*l*) S. 180.

(*m*) S. 180; *post*, Chap. xii.

(*n*) S. 180.

(*o*) S. 174.

(*p*) S. 183.

(*q*) S. 181.

(*r*) S. 185.

and execution may issue for recovery of possession of the property, or such part thereof as the jury shall find the claimant entitled to, and for costs of the suit (s).

[*280] As regards the mode of recovering the meane profits *under the improved procedure:—In a case not arising between landlord and tenant after judgment has been obtained in the action of ejectment, a separate action of trespass for meane profits must be brought. Where, however, the ejectment is by a landlord against his tenant after a forfeiture or otherwise, the claimant may at the trial (after proof that the defendant was served with notice of trial, and after proof likewise by the plaintiff of his right to recover possession of the whole or part of the demised premises) go into evidence of the meane profits received down to the time of the verdict, and may recover damages in respect thereof (t).

Ejectment is a possessory action founded upon a right of entry in the party claiming title, and will in general lie for any real property on which an entry may be made and of which possession may be delivered by the sheriff. In this action the plaintiff must recover on the strength of his own title—not on the weakness of that of the defendant; mere possession, therefore, will give the defendant a *prima facie* right to the land in question (u). “In truth and substance,” as long since judicially observed (x), “a judgment in ejectment is a recovery of the possession (not of the seisin or freehold) without prejudice to the right, as it may hereafter appear even between the parties.” With a view, however, to repressing vexatious litigation which might ensue if the above doctrine were unreservedly applied, it is now provided that the claimant in a second ejectment, brought for the same premises against the same defendant, may by the court or a judge be ordered to give security for costs, with a stay of proceedings until such security shall have been given (y).

[*281] Ejectment, as will appear in the concluding chapter of *this Volume, may, subject to restrictions as regards the value of the property sought to be recovered, be brought in the county court; and possession of premises may under certain circumstances be summarily obtained either there or by magisterial intervention, as will be hereafter mentioned.

The next species of injury to be noticed affecting a man's lands, tenements, or hereditaments is trespass. Trespass, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live; whether it relates to a man's person or his property. Therefore beating another is a trespass (z); taking a man's goods is a trespass (a); for which an action of trespass is given by the law: and, in general, any forcible act of one man whereby another is directly injured, is a transgression or trespass in its largest sense, for which an act of trespass will lie.

But in the limited and confined sense, in which we are at present to consider it, trespass signifies no more than an entry on another man's ground without a lawful authority, or doing some direct damage, however inconsiderable, to his real property. For the right of *meum* and *tuum*, or property in land, being

(s) If, however, the verdict be for the defendant, judgment may be signed and execution may issue for costs against the claimant, s. 186.

(t) S. 214.

(u) Selw. Nl. Pri. 12th ed. ii. 696, 704

(x) *Per Lord Mansfield, Taylor v. Atkyns v. Horde*, 1 Burr. 114, C. L. Proc. Act, 1853, s. 207.

(y) C. L. Proc. Act, 1854, s. 93.

(z) *Ante*, p. 128.

(a) *Ante*, p. 255.

once established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression. The Roman law seems to have made a direct prohibition necessary, in order to constitute this injury: *qui alienum fundum ingreditur, potest a domino, si is prævideret, prohiberi ne ingrediatur*" (b). But the law of England, justly considering that serious inconvenience may happen to the owner, before he has an opportunity to forbid the entry, has carried the point much further, and * has treated every entry upon another's land (unless by the [*282] owner's leave, or in some very particular cases), as an injury or wrong, for satisfaction of which an action of trespass will lie; though a jury in determining the proper *quantum* of that satisfaction, will consider how far the offence was wilful or inadvertent, and will estimate the value of the actual damage sustained.

Every unwarrantable entry on another's soil the law entitles a trespass by "breaking his close:" the words of the old writ of trespass commanding the defendant to show cause *quare clausum querentis fregit*. For every man's land is, in the eye of the law, enclosed and set apart from his neighbour's: and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage, as the treading down and bruising his herbage (c).

A person must have actual possession of land to be able to maintain such an action of trespass; or at least, it is requisite that he have a possession of the vesture and herbage of the land (d). (567) Thus if a meadow be divided annu-

(b) Inst. 2, 1, 12.

(c) F. N. B. 87, 88.

(d) Dyer, 285; 2 Roll. Abr. 549.

Trespass will also lie by one entitled to a grant of underwood (Cro. Eliz. 418; Moor, 355, pl. 488), to an exclusive right of digging turves (*Wilson v. Mackreth*, 3 Burr. 1824), or

to the exclusive enjoyment of a crop growing on the land (*Crosby v. Wadsworth*, 6 East, 602). And where the trespass is committed by a stranger, he may be sued by one who has a mere possession, whether founded on a good title or not. (*Mutton v. Cook*, 4 Bing. N. C. 392; *Holmes v. Newlands*, 11 Ad. & E. 52.)

(567) In American law the general rule is, that to maintain trespass, *quare clausum*, the plaintiff must have *actual* or *constructive* possession. *Poole v. Mitchell*, 1 Hill (S. C.), 404; *Wheeler v. Hotchkiss*, 10 Conn. 225; *Goodrich v. Hathaway*, 1 Vt. 485; *Van Rensselaer v. Van Rensselaer*, 9 Johns. 377; *Phillips v. DeGroat*, 2 Lans. 192; *Savage v. Holyoke*, 59 Me. 345. Where the premises are vacant, the person having the legal title has the *constructive* possession, and the right of action is in him. *Id.*; *Gardner v. Heart*, 1 N. Y. (1 Comst.) 528. But he cannot bring trespass against one having *actual* possession. *Vance v. Beatty*, 4 Rich. (S. C.) 104; *Cohon v. Simmons*, 7 Ired. (N. C.) 189; *Stean v. Anderson*, 4 Harr. (Del.) 209. It is held, however, that where a person is in possession of land under a void title, and another, having a valid title, peaceably enters and takes possession, the latter is not a trespasser. *Sharon v. Wooldrick*, 18 Minn. 355.

Where lands are occupied by a tenant, he, and not the lessor, is the proper person to bring trespass against a stranger for an unlawful disturbance of the possession. *Campbell v. Arnold*, 1 Johns. 511.

A stranger who, without authority from the owner of premises, enters thereon for a lawful purpose, by invitation of one who is lawfully there by license of the owner, is not a trespasser. *Kelly v. Tilton*, 2 Abb. Ct. App. 495. So, in trespass *quare clausum*, the defendant may prove, in mitigation of damages, that the trespass was not willful and malicious; as that he entered to survey off a portion of the premises sold for quit-rents. *Machin v. Geortner*, 14 Wend. 239.

ally among the parishioners by lot, then after each person's several portion is allotted, he may be capable of maintaining an action for the breach of his close (e): for he has an exclusive interest therein for the time. But [*283] * before entry and actual possession, a person cannot maintain an action of trespass, though he has the freehold in law (f). And therefore an heir before entry upon land cannot have this action, though a disseissee might have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was seised of the land: and the customary heir of a copyholder may after entry sue for trespasses which had been committed previously thereto, for after entry his title relates back (g).

A man is answerable for not only his own trespass, but that of his cattle also: for, if by his negligent keeping they stray upon the land of another (and much more if he permits or drives them on), and they there tread down his neighbour's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages, and the law gives the party injured a double remedy in this case; by permitting him to distrain the cattle thus damage-feasant, or doing damage, till the owner shall make him satisfaction: or else by leaving him to the common remedy *in foro contentioso*, by action. (568) Indeed, an action lies in either of these cases of trespass committed upon another's land either by a man himself or his cattle; wherein a man was according to the ancient form called upon to answer, *quare vi et armis clausum ipsius A. apud B. fregit, et blada ipsius A. ad valentiam centum solidorum ibidem nuper crescentia cum quibusdam averiis depastus fuit, conculcavit, et consumpsit, &c.* (h): for the law has always coupled the idea of force with that of intrusion upon the property of another. And in the action supposed if any unwarrantable act of the defendant or his beasts in coming upon the land be proved, it is an act of trespass for which the plaintiff must recover some damages, such as the jury shall think proper to assess (i).

[*284] * In some cases trespass is justifiable; or rather entry on another's land or into his house shall not be accounted trespass: as if a man comes thither to demand or pay money, there payable; or to execute, in a legal manner, the process of the law. Also a man may justify entering into an inn or public-house, without the leave of the owner first specially asked; because when a man professes to keep such inn or public-house, he thereby gives a general licence to any person properly conducting himself to enter his doors (569) So a landlord may justify entering to distrain for rent; a com-

(e) *Welden v. Bridgewater*, Cro. Eliz. 421.

(f) 2 Roll. Abr. 553.

(g) *Barnett v. Earl of Guildford*, 11 Exch. 19.

(h) Registr. 94.

(i) As to the liability of the owner of a dog in trespass for its unauthorised entry on to the land of another, see *Read v. Edwards*, 17 C. B. N. S. 245.

(568) A person finding horses trespassing on his land may turn them into the highway, and is not liable, though they may be lost in consequence. *Humphrey v. Douglass*, 10 Vt. 71. See *Crane v. Mason*, Wright (Ohio), 338.

(569) Entering a building or dwelling-house without license, express or implied, is a trespass, and entitles the owner to nominal damages. *Adams v. Freeman*, 12 Johns. 406; *Brown v. Perkins*, 1 Allen (Mass.), 89. Keeping an inn amounts to a general license; and it has been held that familiar intimacy between families may be evidence of a general license. *Adams v. Freeman*, 12 Johns. 406; *Martin v. Houghton*, 45 Barb. 238; S. C., 1 Abb. N. S. 339; 81 How. 82.

moner to attend his cattle, commoning on another's land; and a reversioner, to see if any waste be committed on the estate (*k*). Where, however, a man having lawfully entered on the property of another misdemeanors himself, or makes an ill use of the authority with which the law has entrusted him, he shall be accounted a trespasser *ab initio* (*l*): as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night contrary to the inclinations of the owner; this wrongful act will affect and have relation back even to his first entry, and make the whole a trespass (*m*). But a bare non-feasance, as not paying for the wine he calls for, will not make him a trespasser: for this is only a breach of * contract, for which the taverner may have an [* 285] action of debt against him (*n*). So if a reversioner, who enters on pretence of seeing waste, breaks the house, or stays there all night; or if the commoner who comes to tend his cattle, cuts down a tree; in these and similar cases, the law judges that he entered for this unlawful purpose, and therefore, as the act which demonstrates such his purpose is a trespass, he shall be esteemed a trespasser *ab initio* (*o*).

A man may also justify in an action of trespass, on account of the freehold, and right of entry upon the land being in himself; and as such a defence brings the title of the estate in question, this is one of the ways devised, since the abolition of real actions, for trying the property to an estate; though it is not so usual as that by ejectment. Ejectment, being a mixed action, not only gives damages for the ejection, but also possession of the land; whereas in trespass, which is merely a personal action, nothing can be recovered but damages for the wrong committed (*p*).

Another injury to a man's lands and tenements, may be by nuisance. Nuisance, *nocumentum*, or annoyance, signifies any thing that works hurt, inconvenience, or damage. And nuisances are of two kinds: a public Nuisance. or common nuisance, which affects the public, and is an annoyance to all the queen's subjects: for which reason we must refer * it to the class of public wrongs (*q*): and a private nuisance, which is for [* 286] our present consideration. We proceed, therefore, to mark out the several kinds of nuisances, and their ordinary remedies.

(*k*) There is no right, however, to enter on the land of another for the purpose of gleaning there: *Steel v. Houghton*, 1 H. Bla. 51.

As to hunting, in *Earl of Essex v. Capel*, cited, Chitty, Game Laws, 2nd ed. 81, Lord Ellenborough said, "these pleasures are to be taken only when there is the consent of those who are likely to be injured by them, but they must be necessarily subservient to the consent of others. There may be such a public nuisance by a noxious animal as may justify the running him to his earth, but then you cannot justify the digging for him afterwards; that has been ascertained and settled to be law: but even if an animal may be pursued with dogs, it does not follow that fifty or sixty people have therefore a right to follow the dogs, and trespass on other people's lands." See, also, *Hume v. Oldacre*, 1 Stark. 351.

(*l*) *The Six Carpenters' Case*, 8 Rep. 146a.

(*m*) 2 Roll. Abr. 561.

(*n*) *The Six Carpenters' Case*, *supra*.

(*o*) 8 Rep. 146.

See Leg. Max., 4th ed., pp. 296, *et seq.*, where many other cases illustrating the text are cited.

(*p*) The questions—whether an action of trespass to land was brought for the purpose of trying a right, and whether the trespass was wilful and malicious may be very material as regards the costs.

See stat. 8 & 4 Vict. c. 24, s. 2, which enacts that if the plaintiff, in an action of trespass, or on the case, shall recover by the verdict of a jury less damages than forty shillings, he shall not be entitled to any costs whatever, unless the judge or presiding officer before whom the verdict is obtained, shall immediately afterwards certify on the back of the record, that the action was brought to try a right, besides the mere right to recover damages for the trespass or grievance complained of, or that the trespass or grievance was wilful and malicious. See, also, *id.* s. 3; 30 & 31 Vict. c. 142, s. 5; 8 & 9 Will. 3, c. 11, s. 8.

(*q*) *Post*, vol. iv.

In discussing the several kinds of nuisances, we will consider, I. Such nuisances as may affect a man's corporeal, and II. Those which may damage his incorporeal hereditaments.

I. If a man builds a house so close to mine that his roof overhangs my roof, and throws the water off his roof upon mine, this is a nuisance, for which an action will lie, even without proof of special damage (*r*). We have seen, likewise, in our preceding Volume, that to erect a house or other building so near to mine, that it obstructs my ancient lights and windows, is a nuisance; though if the windows be ancient, that is, have not subsisted for so long a time without interruption as to give a prescriptive right, and there be no covenant or contract affecting the matter, there is no injury done. For my neighbour is as much entitled to build a new edifice upon his ground as I am upon mine; since every man may erect what he pleases upon the upright or perpendicular of his own soil, so as not to prejudice what has long been enjoyed by another; and it was my folly to build so near another's ground as to run the risk of being thus incommoded. (570) And depriving one of a mere matter of pleasure, as of a fine prospect by building a wall, or the like; this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance (*s*).

If we define a private nuisance, such as here under notice, to be any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another (*t*), the jury, on the trial of an action for nuisance, will have to determine whether the act complained of did cause *annoyance, in a substantial degree, to the complainant; they will not have to consider merely whether the act complained of was done in a place convenient for the purpose (*u*). And whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of had occurred, the annoyance is sufficiently great to amount to a nuisance at law, according to the idea above given of it, an action will lie against the person who caused or erected the nuisance, whatever the locality may be (*x*). If a person keeps his hogs, or other noisome animals, so near the house of another, that the stench of them incommodes him and makes the air unwholesome, this may be a nuisance, inasmuch as it tends to deprive him of the use and benefit of his house (*y*). A like injury may be, if one's neighbour sets up and exercises any offensive trade; as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in subservience to the rule, "*sic utere tuo, ut alienum non lœdas*" (*z*).

On the one hand, it has long been settled that a man may, without being liable to an action, exercise a lawful trade, as that of a butcher, a brewer, or the like, notwithstanding it be carried on so near the house of another as to be an annoyance to him in rendering his residence there less delectable or agreeable, provided the trade be so conducted that it does not cause what amounts, in point of law, to a nuisance to the neighbouring house (*a*).

(*r*) *Fry v. Prentice*, 1 C. B. 828.

(*s*) *Aldred's Case*, 9 Rep. 58.

(*t*) Finch, L. 188.

(*u*) *Cavey v. Ledbetter*, 18 C. B. N. S. 470.

(*x*) *Bamford v. Turnley*, 3 B. & S. 62.

(*y*) *Aldred's Case*, 9 Rep. 59.

(*z*) Leg. Max., 4th ed., p. 857.

(*a*) *Bamford v. Turnley*, 3 B. & S. 62.

On the other hand, it is clear that a person using a limekiln, or other works, which emit noxious vapours, is not justifiable in doing an actionable injury to another; and that any place where such an operation is carried on, so that it does occasion an actionable injury to another, is *not, in the [*288] meaning of the law, a convenient place in which to carry on the business (b). Further, if a man erects smelting-works for lead so near the land of another, that the vapour and smoke kill his corn and grass, and damage his cattle therein, this will be held to constitute a nuisance (c). And, generally, if one does any such act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance: and it is incumbent on the person carrying on such a noxious business to find some other place in which to do that act, where it will be less offensive.

Here, however, a distinction should be noticed between an action brought for a nuisance upon the ground that it produces material damage to property, and an action brought for a nuisance upon the ground that the thing alleged to be a nuisance is productive of personal discomfort; an answer to the question whether that which interferes with one's personal convenience and enjoyment or quiet, which discomposes or injuriously affects one's senses or nerves, may be denominated a nuisance, will depend greatly on the circumstance where the thing complained of actually occurs. If a man lives in a town, of necessity he should subject himself to the consequences of those operations of business which may be carried on in his immediate locality, and are necessary for trade and commerce, also for the enjoyment of property and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when a business is carried on by one person in the neighbourhood of another, and the result of that business is a material injury, there arises a different *consideration; and the above [*289] rule as to the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours would not apply under circumstances the immediate result of which is sensible damage to the value of the property (d). (571)

(b) *Per* Mellor, J., adopted by Lord Cranworth, 11 H. L. Cas. 652.
(c) 1 Roll. Abr. 89.

(d) *Per* Lord Westbury, C., *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642.

(571) As to what constitutes an actionable nuisance it is said, that if the thing complained of causes *hurt, inconvenience, annoyance or damage*, even in the least degree, the person creating it must be answerable for consequences. No matter how small the damage the person sustaining it will have a right of action. But there must be some damage *in fact*, not merely in *imagination*. *Cooper v. Hall*, 5 Ohio, 320. See *Garrison v. State*, 14 Ind. 287; *Palmer v. Mulligan*, 3 Caines, 307. And regard should be had to the notions of comfort and convenience generally entertained by persons of ordinary tastes and susceptibilities. What such persons would not regard as an inconvenience, materially interfering with their physical comfort, may be properly attributed, when alleged to be a nuisance, to the fancy or fastidious taste of the party. On the other hand, the charge of a nuisance, if it be of a thing offensive to persons generally, cannot be escaped by showing that to some persons it is not at all unpleasant or disagreeable. *Columbus Gas, etc., v. Freedland*, 12 Ohio St. 392, 399.

Nuisances are of course almost infinitely dissimilar in kind; thus an excavation made by a landowner on his own premises and left unfenced so very near to a highway or public path as to be dangerous, may constitute a nuisance, and under such circumstances the landowner may be liable at suit of one who, passing lawfully along the public way, inadvertently oversteps its boundary and falls into the hole (*e*). So it may be a nuisance to stop or divert water which has been accustomed to run to another's meadow or mill; to corrupt or poison a water-course, by erecting a dye-house or a lime-pit for the use of trade, in the upper part of the stream, or in short to do any act therein, that in its consequences must necessarily tend to the prejudice of one's neighbour (*f*). (572) So closely does the law of England enforce that excellent rule of gospel-morality, of "doing to others, as we would that they should do unto ourselves."

Not only a nuisance but a breach of duty causing damage to real property will be actionable; as if my neighbour, who ought to scour a ditch, does not, whereby my land is overflowed, this is an actionable nuisance (*g*). So if a person for his own purposes brings upon his land, and collects and keeps there some material such as water, likely, unless kept under control and within strict limits, to do mischief, the person who collects the water must keep it in at his peril, and if it escapes is *prima facie* answerable for damage which may [* 290] be the natural * consequence of its escape. The party on whom this obligation is imposed can only excuse himself by showing that the escape was owing to the default of the complainant, or perhaps by showing that it was the consequence of *vis major* or of the act of God (*h*). And if a man so negligently constructs a hay-rick upon the extremity of his land that, in consequence of its spontaneous ignition, his neighbour's house is burnt, he may be liable to be sued for breach of duty (*i*).

Let us next consider the remedies which the law has allowed for this injury of nuisance. And here I must premise that the law gives no private remedy for anything but a private wrong. Therefore no action lies for
 Remedy for
 nuisance. a public nuisance, but an indictment only: because, the damage being common to all the queen's subjects, no one can assign his particular proportion of it; or, if he could, it would be extremely hard if every subject in the kingdom were allowed to harass the offender with a separate action. For

(*e*) *Barnes v. Ward*, 9 C. B. 392; *Hadley v. Taylor*, L. R. 1 C. P. 53. (*h*) *Rylands v. Fletcher*, L. R. 8 H. L. Cas. 330.

(*f*) *Ante*, vol. ii.

(*g*) *Hale on F. N. B.* 427.

(*i*) *Vaughan v. Menlove*, 8 Bing. N. C. 468.

It seems that nothing can be a nuisance to which the agency of men does not contribute (*Mohr v. Gault*, 10 Wis. 513); and that which is authorized by an act of the legislature cannot be a nuisance. *Trustees, etc., v. Utica, etc.*, 6 Barb. 318; *Stoughton v. State*, 5 Wis. 291; *Butler v. State*, 6 Ind. 165; *Hatch v. Vermont, etc.*, 2 Williams (Vt.), 142. See *People v. President, etc., N. Y. Gas-light Co.*, 64 Barb. 70; S. C., 6 Lans. 467.

(572) Any person interested in the use and enjoyment of the water of a running stream is entitled to receive it pure and uncontaminated; and he may maintain an action for any special injury sustained by him in consequence of the corruption of the water by any other person. *Carhart v. Auburn Gas-light Co.*, 23 Barb. 297; *Merrifield v. Lombard*, 18 Allen (Mass.), 16; *Story v. Hammond*, 4 Ohio, 833. The mere diminution of a stream, to be unlawful, must be substantial, and sufficient to cause actual damage. *Gerrish v. New Market Man. Co.*, 10 Fost. (80 N. H.) 478; *Gillett v. Johnson*, 30 Conn. 180; *Wheatley v. Chrisman*, 24 Penn. St. 298; *Chatfield v. Wilson*, 31 Vt. 358; *Dilling v. Murray*, 6 Port. (Ind.) 324.

this reason, no person, natural or corporate, can have an action for a public nuisance; but only the queen in her public capacity can punish the misdemeanant. Yet this rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the queen's subjects, by a public nuisance; in which case he shall have a private satisfaction by action. (573) As if, by means of a ditch dug across a public way, a man or his horse sustain any damage by falling therein; for this particular damage, which is not common to others, the party shall have his action (*k*). But a bookseller, who, having a shop by the side of a public thoroughfare, suffers a temporary loss in his business in consequence of passengers being diverted from it by an obstruction wrongfully erected or maintained therein, cannot recover for such damage (*l*). * And a reversioner may sue for damage [* 291] caused to his reversionary interest by a nuisance (*m*). Such an action is on the case, and in it an injunction may be claimed against the repetition or continuance of the injury, or the committal of any injury of a like kind relating to the same property or right (*n*).

An action for nuisance will not, however, lie, unless evidence be given of damage resulting from the nuisance, and it may occasionally be necessary for the pleader by a somewhat careful scrutiny to satisfy himself that damage has really been sustained by one complaining of such an injury—that what is put forward and relied upon as damage is not illusory merely, and inappreciable, but is susceptible of proof (*o*).

Another remedy sometimes allowed by law to one aggrieved by a nuisance is, the abatement or removal of it by his own act (*p*). But if a man has abated, or removed, a nuisance which offended him, in this case he is entitled to no action (*q*). For he had choice of two remedies; either without suit, by abating it himself, by his own mere act and authority; or by suit, in which he may both recover damages, and remove it by the aid of the law: and, having made his election of one remedy, he is totally precluded from the other. (574) More-

(*k*) Co. Litt. 56.

(*l*) *Ricket v. Metropolitan R. C.*, L. R. 2 H. L. 175.

(*m*) *Cox v. Glus*, 5 C. B. 583. See *Simpson v. Savage*, 1 C. B. N. S. 347.

(*n*) 17 & 18 Vict. c. 125, s. 79.

(*o*) *Smith v. Thackerah*, L. R. 1 C. P. 564;

Winterbottom v. Lord Derby, L. R. 2 Ex. 316;

Ricket v. Metropolitan R. C., L. R. 2 H. L. 175.

(*p*) *Ante*, p. 5.

(*q*) *Baten's Case*, 9 Rep. 55 a.

(573) See *Francis v. Schoellkopf*, 53 N. Y. (8 Sick.) 152; *Scott v. Bay*, 3 Md. 431; *Lansing v. Smith*, 4 Wend. 9; *Abbot v. Mills*, 3 Vt. 529; 5 Wait's Pr. 276. Courts of equity have concurrent jurisdiction with courts of law in cases of private nuisance. Thus, a court of equity will restrain by injunction the further continuance of a private nuisance in behalf of one whose adjacent tenement or trade is injured in its enjoyment or impaired in its advantages by such nuisance. *Gilbert v. Micks*, 4 Sandf. Ch. 357; S. C., 5 N. Y. Leg. Obs. 10; *Norris v. Hill*, 1 Mann. (Mich.) 203. But this jurisdiction is always exercised sparingly and with great caution (*Simpson v. Justice*, 3 Ired. [N. C.] 115); and it is not every case which will furnish a right of action against a party for a nuisance, which will justify the interposition of courts of equity to redress the injury or to remove annoyance. 2 Story's Eq. Jur., § 925. See *Bruce v. Pres., etc., of Del. Canal Co.*, 19 Barb. 378; *Corp. of N. Y. v. Mapes*, 6 Johns. Ch. 46; *Dana v. Valentine*, 5 Metc. (Mass.) 8, 118; *Fisk v. Wilber*, 7 Barb. 400.

(574) A private nuisance may be abated by any one whose property is injured; and entry for such purpose is justifiable. *State v. Dibble*, 4 Jones (N. C.), 107; *Lancaster, etc., v. Rogers*, 2 Penn. St. 114. The remedy by action is not barred by the act of abating the nuisance. *Gleason v. Gary*, 4 Conn. 418; *Pierce v. Dart*, 7 Cow. 609; *Call v. Buttrick*, 4 Cush. (Mass.) 345. See *Rogers v. Rogers*, 14 Wend. 181.

over, if there be two ways of abating a nuisance, the person abating it must choose the less mischievous of the two (r).

Another species of injury, that may be offered to real property, is by waste, or destruction in lands and tenements. This has been already (s)
 Waste.
 considered, and I shall here only observe, that waste is a spoil and
 [* 292] destruction of *the estate either in houses, woods, or lands; by demolishing not the temporary profits from them only, but the very substance of the thing; thereby rendering it wild and desolate; which the common law expresses significantly by the word *vastum*: and that this *vastum*, or waste, is, either voluntary or permissive; the one by an actual demolition of the lands, woods, and houses; the other arising from mere omission, negligence, and want of sufficient care in making reparations, suffering the property to fall into decay, and the like. So that my only business is at present to show, to whom this waste may be an injury at law; and who is entitled to any, and what, remedy in respect of it by action.

The persons who may be injured by waste, are such as have some interest in the estate wasted; if, indeed, a man be the absolute tenant of land in fee simple, without any incumbrance or charge on the premises, or if he be tenant in tail, without impeachment of waste, he may commit whatever waste his own indiscretion may prompt him to, without being impeachable, or accountable for it to any one. And, though his heir or the next tenant in tail is sure to be the sufferer, yet, in either of the cases mentioned, the person who possesses and enjoys the property may treat it as he likes, and cannot be called to account for so doing by the party who may be afterwards entitled to it. The nonliability of the tenant in fee simple results, indeed, from the well-known maxim, *nemo est hæres viventis*; no man is sure of succeeding him, as well on account of the uncertainty which shall die first, as also because the tenant in fee has it in his own power to constitute what heir he pleases, according to the civil law notion of a *hæres natus* and a *hæres factus*: or, in the more accurate phraseology of our English law, he may alienate or devise his estate to whomever he thinks proper, and by such alienation or devise may disinherit his heir at law. Into whose hands soever therefore the estate wasted comes, after a tenancy in fee-
 [* 293] simple, though the waste is undoubtedly **damnum*, it is, in legal contemplation, *damnum absque injuriâ*, and no action will lie for it. A tenant in tail, without impeachment of waste, holding, as is said *per formam doni*, is not liable, if he commit it, by the express words of the limitation under which he holds. The most effectual remedy for restraining waste is, as already shown, afforded by a court of equity; but in general an action on the case in which an injunction may be claimed (t) will lie for it at law.

(r) *Roberts v. Ross*, L. R. 1 Ex. 82, 89.

(t) 17 & 18 Vict. c. 125, s. 79.

(s) *Ante*, vol. ii.

Every injury caused by the continuance of a nuisance is in law a new nuisance, and affords a new and distinct ground of action, with a liability to increased damages. See *Pennoyer v. Saginaw*, 8 Mich. 534; *Pillsbury v. Moore*, 44 Me. 154; *Marlborough v. Sisson*, 31 Conn. 332; *Waggoner v. Jermaine*, 3 Denio, 306. The rule of damages is the injury actually sustained at the commencement of the suit; and there can be no recovery for permanent or prospective injury. *Smith v. McConathy*, 11 Mo. 517; *Thayer v. Brooks*, 17 Ohio, 489. See *Shaw v. Crummiskey*, 7 Pick. (Mass.) 76; *Roush v. Walter*, 10 Watts (Penn.), 86.

As to whether any length of time will enable a party to *prescribe* for a nuisance, see *Lewis v. Stein*, 16 Ala. 214; *Mulligan v. Elias*, 12 Abb. N. S. 259; *ante*, note 213.

One species of interest, which may be injured by waste, is that of a person who has a right of common in the place wasted; especially if it be common of estovers, or a right of cutting and carrying away wood for house-bote, plough-bote, &c. Here, if the owner of the wood demolishes the whole wood, and thereby destroys all possibility of taking estovers, this is an injury to the commoner, amounting to no less than a disseisin of his common of estovers, if he chooses so to consider it; for which he may have his remedy by an action on the case.

But the interest in land most material, and most often prejudiced by the commission of waste, is that of the remainder-man or reversioner after a particular estate in being. Here, if the particular tenant (be it the tenant in dower or by curtesy, who was answerable for waste at the common law (*u*), or the lessee for life or years, who was first made liable by the Statutes of Marlbridge (*x*) and of Gloucester (*y*)), if the particular tenant, I say, commits or suffers any waste, it is a manifest injury to him who has the inheritance, as it tends to mangle and dismember it of its most desirable incidents and ornaments, among which timber and houses may justly be reckoned the principal. To him therefore in remainder or reversion, to whom the inheritance appertains in expectancy (*z*), our ancient law * gave an adequate remedy [* 294] by writ of waste (*a*), in lieu of which an action on the case is now maintainable. This latter remedy, indeed, is more widely applicable than was the action of waste, which lay for him only who had the inheritance in reversion or remainder in the land wasted, whereas case will lie for him entitled as reversioner or remainder-man for life or years (*b*). In such action the defendant, on the trial, may give in evidence anything that proves there was no waste committed, as that the destruction happened by lightning, tempest, the king's enemies, or other inevitable accident (*c*). An action will not, however, lie for permissive waste (*d*). (575)

A service is sometimes due by ancient custom and prescription only, for the withholding of which a remedy by action may be had. Such is that of doing suit to another's mill: where the persons, resident in a particular place, by usage time out of mind have been accustomed to grind their corn at a certain mill; and afterwards any of them go to another mill, and withdraw their suit (their *secta*, *a sequendo*) from the ancient mill. This may be not only a damage, but an injury to the owner; such prescription, indeed, might have had a very reasonable foundation; viz., upon the erection of such mill by the ancestor of the owner for the convenience of the inhabitants, on condition, that, when erected, they should all grind their corn there only. And for this injury the owner might formerly have had a writ *de*

(*u*) 2 Inst. 209.

(*x*) 52 Hen. 3, c. 23.

(*y*) 6 Edw. 1, c. 5.

(*z*) Co. Litt. 53.

(*a*) Abolished by 3 & 4 Will. 4, c. 27, s. 36.

(*b*) See *Bacon v. Smith*, 1 Q. B. 345.

(*c*) Co. Litt. 53.

(*d*) 5 Rep. 13. Hale, MSS.

(575) Contrary to the doctrine in the text it is held, by an American court, that an action on the case in the nature of waste will lie against a tenant for years, for *permissive* waste. *Moore v. Townshend*, 33 N. J. L. (4 Vroom) 284. As to the American doctrine of waste generally, see *Crockett v. Crockett*, 2 Ohio St. 180; *Irwin v. Casode*, 24 Penn. St. 163; *Baughner v. Crane*, 27 Md. 36; *Neel v. Neel*, 19 Penn. St. 323; 4 Kent's Com. 76 *et seq.* As to the remedies for waste, see 5 Walt's Pr. 269.

secta ad molendinum (e), commanding the defendant to do his suit at that mill, *quam ad illud facere debet, et solet*, or show good cause to the contrary: in which action the validity of the prescription might have been tried, and if it were found for the owner, he was entitled to recover damages against the [* 295] defendant (f). * In like manner, and for like reasons, the register (g) informs us, that a man might have had a writ of *secta ad furnum, secta ad torrale, et ad omnia alia hujusmodi*; for suit due to his *furnum*, his public oven or bakehouse; or to his *torrale*, his kiln or malthouse: when a person's ancestors had erected a convenience of that sort for the benefit of the neighbourhood, upon an agreement (proved by immemorial custom) that all the inhabitants should use and resort to it when erected. But these special remedies to compel the performance of services such as mentioned have been abolished (h), and an action on the case is now the appropriate remedy for the party thus injured.

II. A wrong may be done to an incorporeal hereditament, by hindering or disquieting the owner in his regular and lawful enjoyment of it (i). Such wrong may be constituted by disturbance—1. of a franchise; 2. of common; 3. of a way; 4. of a fair or market; 5. of an ancient ferry; 6. of tenure; 7. of patronage.

1. Disturbance of a franchise happens when a man has the franchise of holding a court-leet, of keeping a fair or market, of free-warren, of taking toll, 1. Disturbance of seizing waifs or estrays, or (in short) any other species of franchise whatsoever; and he is disturbed or incommoded in the lawful exercise thereof. As if another, by distress, menaces, or persuasions, prevails upon the suitors not to appear at my court; or obstructs the passage to my fair or market; or hunts in my free-warren; or refuses to pay me an accustomed toll; or hinders me from seizing the waif or estray, whereby it escapes or is carried out of my liberty; in any case of this kind, there is an injury done to the legal owner; his property is damnified; and the profits arising from such his franchise are diminished; to remedy which, he is entitled [* 296] to sue for damages by a special action on * the case; or, for toll, the owner may take a distress if he pleases (j).

2. The disturbance of common occurs where an act is done, by which the right of another to his common is incommoded or diminished. This may happen, where one who has no right of common, puts his cattle 2. Disturbance of common. on the land; and thereby robs the cattle of the commoners of their respective shares of the pasture. Or if one, who has a right of common, puts in cattle which are not commonable, as hogs and goats; which amounts to the same inconvenience. But the lord of the soil may (by custom or prescription, but not without) put a stranger's cattle on to the common (k); and also, by a like prescription for common appurtenant, cattle that are not commonable may be put on to the common (l). The lord also of the soil may justify making burrows therein, and putting in rabbits, provided they do not increase to so large a number as to destroy the common (m). But in general, in case the beasts of a stranger, or the uncommonable cattle of a commoner,

(e) F. N. B. 123.

(f) Co. Ent. 461.

(g) Fol. 153.

(h) 3 & 4 Will. 4, c. 27, s. 36.

(i) Finch, L. 187.

(j) Cro. Eliz. 558.

(k) 1 Roll. Abr. 396.

(l) Co. Litt. 122.

(m) Cro. Eliz. 876; Cro. Jac. 195.

be found upon the land, the lord or any of the commoners may distrain them damage-feasant (*n*). And the commoner may bring an action on the case to recover damages, without proving any specific damage to himself, against a person wrongfully depasturing cattle on the common, because the law considers that the right of the commoner is injured by such an act, and therefore allows him to bring an action for it to prevent a wrongdoer from gaining a right by repeated acts of encroachment. For wherever any act injures another's right, and would be evidence in future in favour of the wrongdoer, an action may be maintained for an invasion of that right, without proof of specific injury; that is to say, wherever one man does an act, which, if repeated, would operate in derogation of the right of another, he is liable to an action, * without proof of particular damage, at suit of the person [* 297] whose right may be so affected (*o*).

Another disturbance of common is by surcharging it; or putting more cattle thereon than the pasture and herbage will sustain, or the party has a right to do. In this case he who surcharges does an injury to the rest of the owners, by depriving them of their respective portions, or at least diminishing them. This injury by surcharging can, properly speaking, only happen, where the common is appendant or appurtenant (*p*), and of course limitable by law; or where, when in gross, it is expressly limited and certain.

The remedy, for surcharging the common, is either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass, which may be had by the lord; or by an action on the case, in which any commoner may be plaintiff (*q*).

* There is yet another disturbance of common to be here noticed, [* 298] when the owner of the land, or other person, so encloses (*r*) or obstructs it, that the commoner is precluded from enjoying the benefit therefrom to which he is by law entitled. This may be done, by erecting houses or fences on the common, or by driving the cattle off the land, or by ploughing up the soil of the common (*s*). Or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities, that they devour the whole herbage, and thereby destroy the common. For the law looks upon this as an injurious disturbance of the commoner's right, and has given him his remedy by action against the owner (*t*).

(*n*) *Mary's Case*, 9 Rep. 112 b.

(*o*) *Harrop v. Hirst*, L. R. 4 Ex. 48, and cases there cited; 1 Wms. Saund. 846.

(*p*) *Ante*, vol. ii., chap. 8.

(*q*) *Dixon v. James*, Freem. 273.

The ancient method of proceeding, under the circumstances, *supra*, was by writ of admeasurement of pasture. This lay either where a common appurtenant or in gross was certain as to number, or where a man had common appendant or appurtenant to his land, the quantity of which common had never been ascertained. In either of these cases, any of the commoners was entitled to this writ of admeasurement; which was directed to the sheriff, and not returnable to any superior court, till finally executed by him. It recited a complaint, that the defendant had surcharged, *superoneravit*, the common; and therefore commanded the sheriff to admeasure and apportion it; that the defendant might not have more

than belonged to him, and that the plaintiff might have his rightful share. And upon this suit all the commoners were to be admeasured, as well those who had not, as those who had surcharged the common; as well the plaintiff as the defendant. The execution of the writ was by a jury of twelve men, who were upon their oaths to ascertain, under the superintendence of the sheriff, what and how many cattle each commoner was entitled to feed. And the rule for this admeasurement was generally understood to be, that the commoner should not turn more cattle upon the common than were sufficient to manure and stock the land to which his right of common was annexed; or, as our ancient law expressed it, such cattle only as were levant and couchant upon his tenement.

(*r*) As to the enclosure of commons by act of parliament, *ante*, vol. ii.

(*s*) *Leverett v. Townsend*, Cro. Eliz. 198.

(*t*) *Haden v. Gryssel*, Cro. Jac. 195.

The policy of our law, however, is not to allow a commoner to abate a nuisance upon the common, except only in few cases, for an action will best ascertain the just measure of the damage which may have been sustained. But if the lord erect a wall, gate, hedge, or fence round the common, to prevent the commoner's cattle from going into the common, the commoner may abate the erection (*u*), because it is inconsistent with the grant actual or presumed under which he claims. The interest which a commoner has in the common, is usually to eat the grass by the mouths of his cattle. But he cannot cut the grass, wood, bushes, fern, or other things growing on the common, nor can he make fish-ponds there (*x*). So if the lord plant trees on the common, whereby the commoner cannot have his common so beneficially as he ought, the commoner cannot cut them down, for they are part of the soil itself; but he must [* 299] bring an action on the case against the lord (*y*). * And if the lord's rabbits increase so much that there is not a sufficiency of common left, the commoner cannot fill up the coney burrows, for that would be a meddling with the soil, but he must bring his action (*z*). Much less can a commoner kill the rabbits to prevent their increase to the prejudice of the common (*a*).

3. Another species of disturbance, that of ways, principally happens when a person, who has a right of way over another's ground, by grant or prescription, is obstructed in exercising it by enclosures, or other obstacles, or by ploughing across it: by which means he cannot enjoy his right of way, or at least cannot enjoy it in so commodious a manner as he might have done. The remedy for such disturbance is by an action on the case to recover damages (*b*). (576)

4. Again, if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that he does me a prejudice, it is a nuisance to the freehold which I have in my market or fair (*c*). But in order to make this out to be a nuisance, it is necessary, 1. That my market or fair be the elder, otherwise the nuisance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine. For Sir Matthew Hale (*d*) construes the *dieta*, or reasonable day's journey mentioned by Bracton (*e*), to be twenty miles; and so it was understood to be, not only in our own law (*f*), but also in the civil (*g*), from which we probably borrowed it. So that if the new market be not within seven miles of the old one, it is no nuisance; for it is held reasonable that every man should have a market within one-third of a day's journey from his own home; [* 300] that the day being *divided into three parts, he may spend one part in going, another in returning, and the third in transacting his necessary business there. If such market or fair be on the same day with

(*u*) *Davies v. Williams*, 16 Q. B. 548, and cases cited *ante*, p. 6.

(*x*) *Carrill v. Pack*, 2 Bulstr. 115; *Howard v. Spencer*, 1 Sid. 251.

(*y*) *Sadgrove v. Kirby*, 6 T. R. 488; 1 B. & P. 13.

(*z*) *Cooper v. Marshall*, 1 Barr. 259; 2 Wils. 51.

(*a*) 1 Roll. Abr. 405, pl. 1, 2.

(*b*) Hale on F. N. B. 183; Lut. 111, 119.

See, further, as to the right of way, *ante*, vol. ii. p. 42.

(*c*) F. N. B. 184.

(*d*) Hale on F. N. B. 184.

(*e*) L. 4, c. 46.

(*f*) 2 Inst. 567.

(*g*) Dig. 2, 11.

(576) See *Seneca Road Co. v. Auburn & Rochester R. R. Co.*, 5 Hill, 170; *Osborne v. Butcher*, 2 Dutch. (N. J.) 308.

mine, it is *prima facie* a nuisance to mine, and there needs no proof of it, but the law will intend it to be so; but if it be on any other day, it may be a nuisance; though whether it is so or not, cannot be intended or presumed, but I must make proof of it to the jury.

5. Likewise, if a ferry is erected on a river, so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For ^{5. Disturbance of} where there is a ferry by prescription, the owner is bound to ^{an ancient ferry.} keep it always in repair and readiness, for the ease of all the subjects of the crown; otherwise he may be grievously amerced (*h*): it would be therefore extremely hard, if a new ferry were suffered to share his profits, which does not also share his burthen. But where the reason ceases, the law also ceases with it: therefore it is no nuisance to erect a mill so near mine, as to draw away the custom, unless the miller also intercepts the water. Neither is it a nuisance to set up any trade, or a school, in a neighbourhood or rivalry with another: for by such emulation the public are like to be gainers; and, if the new mill or school occasion a damage to the old one, it is *damnum absque injuria* (*i*).

6. Another species of disturbance mentioned by legal writers of repute, although perhaps unknown at the present day, is that of disturbance of ^{6. Disturbance} tenure, or breaking that connection which subsists between the ^{of tenure.} lord and his tenant, and which the law will not suffer to be wantonly dissolved by the act of a third person. To have an estate well tenanted is an advantage of which every landlord must be sensible: and therefore the driving away of a tenant from off his estate is an injury of no small consequence. So that if there be a tenant at will of any lands * or tene- [* 301] ments, and a stranger either by menaces and threats, or by unlawful distresses, or by fraud and circumvention, or other means, contrives to drive him away, or inveigle him to leave his tenancy, this the law might justly construe to be a wrong and injury to the lord (*k*), and might give him a reparation in damages against the offender by any action on the case.

7. The last and most considerable species of disturbance to be ^{7. Disturbance} noticed, is that of patronage; being a hindrance or obstruction ^{of patronage.} of the patron in presenting his clerk to a benefice.

This injury was distinguished at common law from another species of injury, called usurpation; which is an absolute ouster or dispossession of the patron, and happens when a stranger, who has no right, presents a clerk, who is thereupon admitted and instituted (*l*). In which case, of usurpation, the patron lost by the common law not only his turn of presenting *pro hac vice*, but also the absolute and perpetual inheritance of the advowson, so that he could not present again upon the next avoidance, unless in the meantime he recovered his right by a real action, viz., a writ of right of advowson (*m*), now abolished (*n*). The reason given for his losing the present turn, and not ejecting the usurper's clerk, was that the final intent of the law in creating this species of property being to have a fit person to celebrate divine service, it preferred the peace of the church (provided a clerk were once admitted and instituted) to the right of any patron whatever (*o*). And the patron also lost

(*h*) 2 Roll. Abr. 140.

(*i*) Hale on F. N. B. 184.

(*k*) Hale, Anal. c. 40; 1 Roll. Abr. 108.

(*l*) Co. Litt. 277.

(*m*) 6 Rep. 49.

(*n*) 3 & 4 Will. 4, c. 27, s. 86.

(*o*) *Borael's Case*, 6 Rep. 48.

the inheritance of his advowson, unless he recovered it in a writ of right, because by such usurpation he was put out of possession of his advowson, as much as when by actual entry and ouster, he was disseised of lands or houses; since the only possession of which an advowson is capable, is by actual presentation and admission of one's clerk. As, * therefore, when the clerk [* 302] was once instituted (except in the case of the crown, where he must also be inducted (*p*)) the church became absolutely full; so the usurper by such plenarty, arising from his own presentation, became in fact seised of the advowson: which seisin it was impossible for the true patron to remove by any possessory action, or other means, during the plenarty or fulness of the church; and when it became void afresh, he could not then present, since another had the right of possession. The only remedy therefore, which the patron had left, was to try the mere right in a writ of right of advowson; which was a peculiar writ of right, framed for this special purpose (*q*): and if a man recovered therein, he regained the possession of his advowson, and was entitled to present at the next avoidance (*r*). But in order to such recovery he must have alleged a presentation in himself or some of his ancestors, proving him or them to have been once in possession: for, as a grant of the advowson, during the fulness of the church, conveys no manner of possession for the present, therefore a purchaser, until he had presented, had no actual seisin whereon to ground a writ of right (*s*). Thus stood the common law.

But bishops in ancient times, either by carelessness or collusion, frequently instituting clerks upon the presentation of usurpers, and thereby defrauding the real patrons of their right of possession, it was in substance enacted by statute Westm. 2, 13 Ed. 1, c. 5, s. 2, that if a possessory action were brought within six months after the avoidance, the patron should (notwithstanding such usurpation and institution) recover that very presentation; which gave back to him the seisin of the advowson. Yet still, if the true patron omitted to bring his action within six months, the seisin was gained by the usurper, and [* 303] the patron, to recover it, was driven to the long and hazardous * process of a writ of right. To remedy which it was further enacted by statute 7 Anne, c. 18, that no usurpation shall displace the estate or interest of the patron, or turn it to a mere right; but that the true patron may present upon the next avoidance, as if no such usurpation had happened. So that the title of usurpation was thus much narrowed, and the law now stands upon this reasonable foundation: that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby. Usurpation now gains no right to the usurper, with regard to any future avoidance, but only to the present vacancy: it cannot indeed be remedied after six months are past; but during those six months, it is only a species of disturbance.

Disturbers of a right of advowson may therefore be these three persons; the pseudo-patron, his clerk, and the ordinary; the pretended patron, by presenting to a church to which he has no right, and thereby making it litigious or disputable; the clerk, by demanding or obtaining institution, which tends to and promotes the same inconvenience; and the ordinary, by refusing to admit

(*p*) 6 Rep. 49.
(*q*) F. N. B. 80.

(*r*) F. N. B. 86.
(*s*) 2 Inst. 357.

the real patron's clerk, or admitting the clerk of the pretender. These disturbances are vexatious and injurious to him who has the right: and therefore, if he be not wanting to himself, he may still have for his relief a writ of *quare impedit*; in which the patron, not the clerk, is plaintiff. For the law supposes the injury to be offered to the patron only, by obstructing or refusing the admission of his nominee; and not to the clerk, who has no right in him till institution, and of course can suffer no injury.

Quare impedit. I proceed therefore to inquire into the nature of a *quare impedit*, now the only action available for the disturbance of patronage: and shall first premise the usual proceedings previous to bringing it.

Upon the vacancy of a living, the patron, we know, is * bound to present within six calendar months (*t*), otherwise it will lapse to the bishop. But if the presentation be made within that time, the bishop is bound to admit and institute the clerk, if found sufficient (*u*); unless the church be full, or there be notice of any litigation. For if opposition be intended, it is usual for each party to enter a *caveat* with the bishop, to prevent institution of his antagonist's clerk. An institution after a *caveat* entered is void by the ecclesiastical law (*x*); but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity (*y*). But if two presentations be offered to the bishop upon the same avoidance, the church is then said to become litigious; and, if nothing further be done, the bishop may suspend the admission of either, and suffer a lapse to incur. Yet if the patron or clerk on either side request him to award a *jus patronatus*, he is bound to do it. A *jus patronatus* is a commission from the bishop, directed usually to his chancellor and others of competent learning: who are to summon a jury of six clergymen and six laymen, to inquire into and examine who is the rightful patron; and if, upon such inquiry made and certificate thereof returned to the commissioners, he admits and institutes the clerk of that patron whom they return as the true one, the bishop secures himself at all events from being a disturber, whatever proceedings may be had afterwards in the temporal courts (*z*).

The clerk refused by the bishop may also have a remedy against him in the spiritual court, denominated a *duplex querela* (*a*): which is a complaint in the nature of an appeal from the ordinary to his next superior; and *Duplex querela.* if the superior court adjudges the cause of refusal to be insufficient, it will grant institution to the appellant (*b*).

* Thus far matters may go on in the mere ecclesiastical course; but in contested presentations they seldom go so far: for, upon the first delay or refusal of the bishop to admit his clerk, the patron may bring his action of *quare impedit* against the bishop, for the temporal injury done to his property, in disturbing him in his presentation. And, if the delay arises from the bishop alone, as upon pretence of incapacity, or the like, then he only is sued; but if there be another presentation set up, then the pretended patron and his clerk are also joined in the action; or it may be brought against the patron and clerk, leaving out the bishop; or against the patron only. But it is most advisable to bring it against all three: for if the bishop be left out, and

(*t*) *Ante*, vol. ii.

(*u*) *Ante*, vol. i.

(*x*) 1 Burn, Ecc. L., 9th ed., p. 23.

(*y*) 1 Roll. Rep. 191.

(*z*) 1 Burn, Ecc. L., 9th ed., p. 23, *et seq.*

(*a*) *Ib.* 159.

(*b*) *Ante*, vol. i.

the suit be not determined till the six months are past, the bishop is entitled to present by lapse: for he is not party to the suit; but, if he be named, no lapse can possibly accrue till the right is determined. If the patron be left out, and the action be brought against the bishop and the clerk only, the suit is of no effect, and will abate; for the right of the patron is the principal question in the cause (c). If the clerk be left out, and has received institution before the action brought (as is sometimes the case), the patron by this suit may recover his right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a defendant, and party to the suit, to hear what he can allege against it. For which reason it is the safer way to bring the action against all three.

Quare impedit is now commenced by a writ of summons issuing out of the court of common pleas, in the same manner and form as the writ of summons in an ordinary action, and upon such writ is indorsed a notice that the plaintiff intends to declare in *quare impedit* (d). The service of the writ, appearance of the defendant, proceedings in default of appearance, pleadings, [*306] judgment, execution, *and all other proceedings and costs upon the writ, have been made subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action (e), of which a sketch will be given in our next chapter; and therefore it seems unnecessary to insert at length in these pages the practice and procedure in a suit such as treated of in accordance with the antiquated form (f). Thus much, however, may properly be said, that the plaintiff in a *quare impedit* must state his title, and prove at least one presentation in himself, his ancestors, or those under whom he claims; for he must recover by the strength of his own right, not by the weakness of the defendant: and he must also show a disturbance before the action brought. Upon this the bishop and the clerk may disclaim all title: save only, the one as ordinary, to admit and institute; and the other as presentee of the patron, who is left to defend his own right (g). And upon failure of the plaintiff in making out title, the defendant is put upon the proof of his, in order to obtain judgment for himself, if needful. But if the right be found for the plaintiff, on the trial, three further points are also to be inquired of: 1. If the church be full, and, if full, then of whose presentation: for if it be of the defendant's presentation, then the clerk is removable by writ brought in due time. 2. Of what value the living is: and this in order to assess the damages which are directed to be given by the statute of Westm. 2, 13 Edw. 1, c. 5. 3. In case of plenarty upon an usurpation, whether six calendar (h) months have passed between the avoidance and the time of bringing the action: for then it would not be within the statute, which permits an usurpation to be divested by a *quare impedit*, brought *infra tempus semestris*. So [*307] that plenarty is still a sufficient bar *in an action of *quare impedit*, brought above six months after the vacancy happens; as it was universally by the common law, however early the action was commenced.

If it be found that the plaintiff has the right, and has commenced his action in due time, then he shall have judgment to recover the presentation; and, if

(c) *Hall v. Bishop of Bath and Wells*, 7 Rep. 25; Hob. 316.

(d) 23 & 24 Vict. c. 126, s. 26.

(e) 23 & 24 Vict. c. 126, s. 27.

(f) See Rogers, Ecc. L., 2nd ed., p. 24 et seq.

(g) See the pleadings in a *quare impedit*

(commenced since the first Common Law Procedure Act), *Marshall v. Bishop of Exeter*, 6 C. B. N. S. 716; 7 C. B. N. S. 653; 13 id. 820; L. R. 3 H. L. 17.

(h) 2 Inst. 361

the church be full by institution of any clerk, to remove him: unless it were filled *pendente lite* by lapse to the ordinary, he not being party to the suit; in which case the plaintiff loses his presentation *pro hac vice*, but shall recover two years' full value of the church from the defendant the pretended patron, as a satisfaction for the turn lost by his disturbance (i). But if it should so happen that the church remains still void at the end of the suit, then that party to whom the presentation is found to belong, whether plaintiff or defendant, shall have a writ directed to the bishop, ordering him to admit and institute the clerk of the prevailing party (k)

A period of limitation in *quare impedit* is now prescribed by the statute 3 & 4 Will. 4, c. 27, explained and interpreted by the 6 & 7 Vict. c. 54. By sect. 30 of the former of these statutes the period is defined to be that, during which three clerks in succession shall have held the benefice in question, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of the person seeking to enforce his right to present, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years, and if they shall not, then after the expiration of such further time as with them will make up the full period of sixty years. And where after an adverse possession of the benefice has been obtained, the crown or the ordinary presents by reason of a lapse, such a presentation is to be deemed adverse; except when the avoidance is in consequence of the incumbent being made a bishop, * in which case the [* 308] incumbency of the successor is to be deemed a continuation of that of the bishop (l). And by sects. 33 and 34, after an adverse possession of one hundred years, the right to an advowson is extinguished.

The more recent of the above statutes (6 & 7 Vict. c. 54, s. 3) enacts, that the several periods limited "for bringing a *quare impedit*, or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, shall apply to the case of any bishop claiming a right as patron to collate to or bestow any ecclesiastical benefice, and that such right shall be extinguished in the same manner and at the same periods as the right of any other patron" to present to or bestow a benefice; but the right of a bishop to collate by reason of lapse remains unaffected by the foregoing enactment.

(i) Stat. Westm. 2, 13 Edw. 1, c. 5, s. 8.

(l) Sect. 81.

(k) F. N. B. 38.

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* CHAPTER XII.

PROCEEDINGS IN THE SUPERIOR COURTS OF LAW.

AN ACTION AT LAW.

THE rights and obligations of which our courts of law take cognisance, and for the invasion or breach of which they afford a remedy by action, having been treated of in other parts of this work, we propose here to give some general account of an action at law, and the proceedings in it.

We must here accordingly repeat (*a*) that actions have been from ancient times divided into three classes,—real, personal, and mixed. Real actions are those brought for the recovery of real property only; mixed, for the recovery of real property, and damages for its being wrongfully withholden; while personal actions extend to all claims for money due on contracts, or for damages for breach of contract, or injury to person or property, and also to the recovery of specific goods and chattels, though not for the recovery of land. Personal actions are broadly divided into actions *ex contractu* and *ex delicto*, and they embrace perhaps the widest range of those civil differences that can become subjects of litigation in this country.

In this chapter we shall speak of procedure only, and will treat of it in an ordinary personal action. It may here be premised that the very numerous and highly technical forms of real and mixed actions which existed prior to the 3 & 4 Will. 4, c. 27, were by that Act all abolished except four, viz., writ of right of dower, dower *unde nihil habet*, *quare impedit*, and ejectment; and by the Common Law Procedure Act, 1860, it was further enacted (*b*) that [* 310] * no writ of right of dower, or writ of dower *unde nihil habet*, and no *quare impedit* should be brought after the commencement of that Act in any court whatsoever; but where any such writ, action, or plaint would lie, either in a superior or in any other court, an action might be commenced by writ of summons issuing out of the court of common pleas, in the same manner and form as the writ of summons in an ordinary action; and by s. 27 the writ, and all proceedings thereupon are to be, as nearly as may be, the same as in ordinary actions. The action of ejectment is treated of in another part of this work (*d*).

Taking the case, then, of an ordinary personal action, it may be first observed that the proceedings in it are so regulated throughout that judgment is given against no man without his having been heard, or through his own default refusing to be heard after due notice of the grounds of claim against him. The action is commenced by the complainant summoning the defendant to appear in the action to answer a complaint against him. The appearance required of him is not at this stage of the proceedings an appearance in open court, but a formal entry in writing at the proper office of the court made by the defendant or his attorney, which in effect admits that the defendant has been duly summoned, and is ready to defend himself against any complaint

(*a*) *Ante*, pp. 126, 127.

(*b*) Sect. 26.

(*c*) Dower is for the specific recovery of

dower, *quare impedit*, for obstruction to the right to present to a benefice, *ante*, chap. xi.

(*d*) *Ante*, pp. 273 *et seq.*

the plaintiff may bring against him in the action. The instrument by which he is thus summoned is called a writ of summons, and may be issued at the option of the plaintiff out of any one of the superior courts of common law,—the queen's bench, the common pleas, or the exchequer.

It is not necessary to mention any form or cause of action in the writ of summons (e), a statement of the grounds* of complaint being usually [* 311] made at a subsequent stage, whether the defendant appears or makes default by not appearing.

A statement of the grounds of claim against the defendant is in some sort an essential preliminary to obtaining judgment against him, it is however only in certain cases specially provided for,—for example in cases that come under the provisions of the 25th and 27th sections of the Common Law Procedure Act, 1852, relating to special indorsements of the particulars of debts or liquidated demands on the writ of summons, where judgment follows on the writ without any further statement of the cause of action or default of appearance; also, in proceedings under the summary Bills of Exchange Act, 1855 (f), where the statement of the cause of action is on the writ, judgment follows, unless the defendant appears after leave obtained for that purpose in the manner provided by that Act.

Though the court issues the writ, it may be obtained as a matter of course by any person who seeks to commence an action against another. It is open to any person who conceives he has a cause of action against another at his own pleasure, and it may be added, at his own risk, to sue out a writ of summons against him; all that is necessary is for the plaintiff or his attorney to prepare the writ in accordance with the statutory form, take it to the writ office of the court in which the action is brought, and have it impressed with the seal of the court, at the same time leaving a *præcipe*, or memorandum of the writ with the officer who files it and enters the date thereof and other particulars.

The forms of the writ of summons in personal actions, and certain indorsements to be made on it, the appearance, and many other matters relating to the process by which an action is commenced, are regulated by s. 2 of the Common Law Procedure Act, 1852, and those sections* that follow [* 312] next in succession to s. 33 inclusive (g), taken in connection with schedule (A.) of the Act. Among other things it may be noticed that the writ is entitled in the queen's name, bears date the day it is issued, is tested in the name of the chief justice or chief baron of the court, or in case of a vacancy in that of the senior judge, and states the name of the plaintiff and the name and residence, or supposed residence of the defendant to whom it is addressed, and certain indorsements are required to be made on it (h). The common indorse-

(e) C. L. P. Act, 1852, s. 2.
(f) 18 & 19 Vict. c. 87.

(g) The statutes and the *regula generales* of the judges, under provisions contained in them, on which the procedure of the superior courts of law now mainly depends, are: the Com. Law Proc. Act, 1852; the Com. Law Proc. Act, 1854; the Summary Procedure on Bills of Exchange Act, 1855; and the Com. Law Proc. Act, 1860. It should be observed, also, that there are many unwritten rules of practice not affected by the statutory provisions, and which form part of the practice of the courts.

(h) Sect. 20 of the act is as follows:—If the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by this act to be inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but it may be set aside as irregular, or amended, upon application to be made to the court out of which the same shall issue, or to a judge; and such amendment may be made, upon any application to set aside the writ, upon such terms as to the court or judge may seem fit.

ments (i) on the writ are the name and place of abode of the attorney who sues it out, or the address of the plaintiff if it be sued out by him in person. In all actions which are brought for the payment of any debt, the amount of the debt and costs is to be indorsed on the writ, and if they be paid within four days from service of the writ the proceedings will be stayed. This indorsement does not, like the special indorsement we have already alluded to, give a statement or particulars of the grounds of action, but merely of the amount [* 313] due and * the costs up to that time. in order to give the defendant an opportunity of staying further proceedings by paying them (j). If the amount indorsed is not paid within the four days the action may proceed as if the indorsement had not been made. The special indorsement is provided for by s. 25 of the Procedure Act of 1852 in cases where the defendant resides within the jurisdiction of the court, and the claim is for a debt or liquidated demand in money with or without interest, arising on a contract express or implied (k). In such and similar cases the plaintiff is at liberty to make upon the writ of summons and copy thereof a special indorsement of the particulars of the claim in the form contained in the schedule (A.) to that Act, and the effect of this section in connection with the subsequent section (s. 27) of the Act, is that final judgment may be signed in default of appearance, and execution may issue against the defendant within eight days after the last day for entering an appearance. Section 25 also contains a provision that it shall be lawful for the court or a judge, either before or after final judgment, to let in the defendant to defend upon an application supported by satisfactory affidavits accounting for non-appearance, and disclosing a defence on the merits.

The essential preliminary—that there must be a statement of the cause of action duly notified to the defendant before judgment can be obtained against him, will be exemplified by noticing a little more in detail the difference between the mode of proceeding on the writ specially indorsed and the procedure on that which is not so, where default is made in appearing. On the writ specially indorsed with the statement of the grounds of claim or cause of action, judgment may be signed at once for non-appearance, or an affidavit being filed of personal service of the writ of summons or a judge's order for [* 314] leave to proceed, and a copy of the writ of summons; but in the * case of the writ not specially indorsed, on which there is no statement of the cause of action, there must not only be such affidavit, and a copy of the writ filed, but also a declaration, which is a written statement of the cause of action, must be filed, indorsed with a notice to plead in eight days, and to sign judgment by default at the expiration of the time to plead so indorsed; and in the event of no plea being delivered, where the cause of action stated in the declaration is for any of the claims which might have been inserted in a special indorsement, and the amount claimed is indorsed on the writ of summons, final judgment may be signed and execution issue for an amount not exceeding the amount indorsed on the writ, with interest and costs as in the Act specified.

(i) Where a mandamus is claimed in the action or an injunction, the plaintiff must indorse his writ accordingly. See, as to mandamus, s. 68, and as to injunction, ss. 79 and 80 of the act of 1854; and see also as to the notices required to be indorsed where the plaintiff intends to declare in dower or for freebench, or in *quare impedit*, as the case may be. Com. Law Proc. Act, 1860, s. 26.
(j) See Com. Law Proc. Act, 1852, s. 8.
(k) See the instances given in the section.

The forms of the ordinary writ of summons, and the specially indorsed writ, and the writs for service out of the jurisdiction, though in other respects they may differ, have this feature in common, that they require the defendant to cause an appearance to be entered for him in the court out of which the writ issues in the action at the suit of the plaintiff within a certain time after service of the writ, and give him notice that in default of his doing so, the plaintiff may proceed to judgment and execution (*l*). The time within which an appearance is required to be entered is, in the case of the writs for service within the jurisdiction, a fixed period of eight days after the service of the writ, inclusive of the day of such service; but in writs for service out of the jurisdiction, the time for appearance is regulated by the distance from England of the place where the defendant resides. It may here be observed with regard to proceeding to "judgment and execution," that in the case of a defendant who is out of the jurisdiction, "execution" can only issue against property which he may have in this country.

The original writ of summons is in force for six (*m*) * months (*n*) [* 315] only from the day of its date. Concurrent writs (*o*) may, however, be issued, certain prescribed formalities being complied with; these concurrent writs bearing the same date as the original writ, but being only in force for the period during which the original writ is in force. The use of a concurrent writ is to give a better opportunity of serving the defendant or defendants in the action than a simple writ would afford. For instance, the ordinary writ of summons for service within the jurisdiction may be served in any county, but if the defendant be found to be residing abroad (*p*), a concurrent writ may issue for service out of the jurisdiction for the purpose of reaching him there. The original writ must be served within six months from the date unless it be renewed, as it may be with certain formalities prescribed by the Act (*q*) before the expiration of the six months, and such renewal may be repeated from time to time. In this way an action may be commenced and kept alive for years, and when service is ultimately effected, be it sooner or later, the commencement of the action against the defendant is the original writ of summons, which remains in force, and is available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes from the date of the issuing of the original writ of summons. The service of the writ of summons must, whenever it is practicable, be personal (*r*) (personal service being effected by informing the defendant of the writ, and at the same time delivering a copy of it to him, and showing the * original if demanded (*s*)), and though provisions are made for pro- [* 316] ceeding in the action where personal service cannot be effected, but the defendant knows of the writ and evades the service, yet this is matter of special application to the court or a judge, and it is only on being satisfied by affidavit that reasonable efforts have been made to effect personal service, and

(*l*) Com. Law Proc. Act, 1852, Sched. (A.).

(*m*) Com. Law Proc. Act, 1852, s. 11.

(*n*) Calendar months; the word "month," in an act of parliament, meaning calendar months, unless the contrary is expressed, 18 & 14 Vict. c. 21, s. 4. Com. Law Proc. Act, 1852, s. 9.

(*o*) Com. Law Proc. Act, 1852, ss. 9, 22.

(*p*) A writ for service within the jurisdic-

tion may be concurrent with a writ for service out of the jurisdiction, and *vice versa*, Com. Law Proc. Act, 1852, s. 22.

(*q*) Com. Law Proc. Act, 1852, s. 11.

(*r*) *Ibid.* s. 17.

(*s*) An indorsement of the day of service must be made on the writ by the person serving it, s. 15.

and conditions guarding against injustice being done to any party by reason of their exercise.

Before entering further on the course of proceeding in an action, the different forms of personal actions may be shortly noticed. We have seen that it is no longer necessary to mention any form of action in the writ of [* 320] *summons, and in the statements of causes of action given by schedule (B.) of the Act of 1852 as examples of the mode of preparing such statements no mention whatever is made of any form of action, and this harmonises with those provisions of the Act which allow of different causes of action being joined in the same suit (c) without reference to the forms of action to which they belong. Formerly it was matter of great importance, and sometimes of great nicety, to select the form of action applicable to the particular cause of action sued on, and not to include in the same action causes of action belonging to different forms; and an error in that respect might have proved fatal to the proceedings on grounds quite beside the real merits of the case. The remedial provisions of the Common Law Procedure Act, 1852, have on that head practically removed any danger of an action [* 321] being defeated on grounds purely *technical. But though forms of action are no longer a part of the visible machinery in the writ and pleadings, and are no longer allowed to intervene as an element of mischief in the proceedings in an action, they are still retained so far as they are beneficial, and are frequently referred to in arguments relating to legal wrongs as throwing light upon the question whether on a given state of facts there is any remedy or right of action at law. (577)

whom the legal right may be supposed to exist; and for judgment being given for one or more of the plaintiffs by whom the action is brought; the defendant, though unsuccessful, being entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given, unless otherwise ordered by the court or a judge.

(c) By the C. L. Proc. Act, 1852, s. 41, "Causes of action, of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit;—but this shall not extend to replevin or ejectment; and where two or more of the causes of action so joined are local, and arise in different counties, the venue may be laid in either of such counties; but the court or a judge shall have power to prevent the trial of different causes of action together, if such trial would be inexpedient, and in such case such court or judge may order separate records to be made up, and separate trials to be had."

The above provision that the cause of action must be against the same parties and

in the same rights goes to the character in which the plaintiff or defendant sues or is sued—not to the form of action—for instance, an executor or administrator cannot sue in the same action for a claim in his representative capacity jointly with one which is quite irrespective of it, and which he makes in his own right, *ex. gr.*, he cannot join a claim for the price of goods sold by the testator or intestate with a claim for the price of his own goods sold by himself, neither can he be sued in the same action for money lent to the testator or intestate and for money lent to himself. There is, in the same act, a special clause (s. 40) as to joinder of claims by husband and wife with claims in right of husband for injury done to the latter. Where the injury which the wife complained of was some bodily injury, and a bill was incurred for medical attendance, the husband had to sue separately for the expenses incurred, but now he need no longer do so.

As to an action by husband and wife jointly, *ante*, p. 150; vol. i., chap. xv.

(577) In many of the States the procedure in an action at law is now substantially the same as that described in the text. New York was the first of the States to abolish the forms of actions and pleadings at common law; and to substitute therefor a code of practice which, in a modified form, has since been adopted in several of the other States. In the state of its origin the provisions of this Code took effect July 1st, 1848. The 69th section provides that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this State, hereafter, but one form of action for the enforcement or protection of private rights, and the

The forms of the ordinary personal actions are assumpsit, debt, covenant, trespass, case, trover, detinue, and replevin.

Assumpsit lies for the breach of a contract not under seal; it sounds in damages, that is, it is essentially an action for damages, but these may include a liquidated as well as an unliquidated demand. Thus assumpsit might be brought simply for the price of goods sold, in which case the price to be paid measures the damages to be recovered; or it might be brought for breach of a warranty where the damages are necessarily left at large, and must be assessed on evidence of circumstances which show the loss sustained.

Debt is an action to recover a liquidated or certain sum of money owing from one man to another whether on a specialty (c), or by simple contract (d), or statute (e), or *record (f), and lies wherever there is a direct and [* 322] immediate liability to pay. The action of debt does not sound in damages, the recovery of the debt, *qua* debt, being the main object of the action, though nominal damages may be given for its detention—and sometimes damages more than nominal may in respect of such detention be recovered; for example, in those cases where interest, though not reserved in the contract out of which the debt arose, is by law allowed. It has been observed that in debt the liability to pay must be immediate and direct, and on this head nice distinctions prevailed. It was held, for example, that debt would not lie on a collateral covenant to pay a sum of money on default of another person, but

(c) A debt by specialty, or special contract, is where a sum of money becomes, or is acknowledged to be, due, by deed or instrument under seal. Such as, by covenant, by deed of sale, by lease reserving rent, by bond or obligation: which last (as shown in vol. ii.), is a creation or acknowledgment of a debt from the obligor to the obligee, unless the obligor performs a condition thereunto usually annexed, as the payment of rent or money borrowed, the observance of a covenant, and the like; on failure of which the bond becomes forfeited and the debt becomes due in law.

(d) A debt by simple contract is where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by writing unsealed, which is capable of a more easy proof, and therefore better, than a mere verbal promise.

(e) Where a penalty is recoverable by statute, debt may be made applicable either for the party aggrieved, or for the plaintiff in the action, or for the crown and the plaintiff. Further, an action for damages may some-

times lie against the hundred or other district in which an offence occurred, with a view to enforcing compensation to the plaintiff who has been damaged thereby. See, *ex. gr.*, 7 & 8 Geo. 4, c. 81, ss. 2, 8; 2 & 3 Will. 4, c. 72; 9 & 10 Vict. c. 99, s. 44.

(f) A debt of record is a sum of money which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff in an action or suit at law; this is a contract of the highest nature, being established by the sentence of a court of judicature. A debt upon recognisance is also a sum of money, recognised or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behaviour, or the like: and this, like the old statute-merchant and statute-staple, &c., if forfeited by non-performance of the condition, is also ranked among the first and principal class of debts, viz., debts of record; since the contract on which it is founded is witnessed by the highest kind of evidence, viz., by matter of record.

redress of private wrongs, which shall be denominated a civil action." N. Y. Code of Procedure, § 69. But notwithstanding this sweeping provision it has been well settled, that the legislature could only affect the mere forms of action, and that no law could abolish or change the intrinsic difference between the varying natures of actions themselves; and that the fundamental prerogative of the court of equity to use a discretionary power to adapt its judgments for relief to the particular circumstances of each case remained unchanged. *Paul v. Parakall*, 14 Abb. N. S. 188; *Vermilyea v. Palmer*, 53 N. Y. (7 Sick.) 471; *Lattin v. McCarty*, 41 N. Y. (2 Hand) 107; *Hubbell v. Sibley*, 50 N. Y. (5 Sick.) 468; *Goulet v. Asseler*, 23 N. Y. (8 Smith) 235. See, generally, as to the commencement of actions under the system of practice inaugurated by the Code, 1 *Walt's Pr.* 467 *et seq.*

that it would lie on an absolute covenant to pay a sum due from another person (g). Distinctions of this kind still exist in theory, but can no longer, as we have already seen, be made use of to prevent the determination of the case on its real merits. In either of the above instances the question would [* 323] now simply * be, has the plaintiff stated a good cause of action, no matter under what form it ranges itself, entitling him to recover? (578)

Covenant lies for breach of a covenant or agreement under seal. The action sounds in damages, but, like assumpsit, extends to liquidated as well as unliquidated demands, and is a concurrent remedy with the action of debt for specific sums directly and immediately payable by the covenantor to the coveantee on an absolute covenant to that effect. (579)

Trespass, the nature of which has been already amply exemplified, lies for an injury to person or property, where such injury is direct and immediately results from the application of force.

The remedy in trespass, however, is not confined to an act of positive violence, it extends to any wrongful act when force, in fact, is used, however slight it may be, or however peaceably it may be exercised, provided the injury result immediately from it. (580)

(g) See *Randall v. Rigby*, 4 M. & W. 180; *Evans v. Jones*, 5 M. & W. 295.

(578) Assumpsit will not lie where the controversy arises upon a contract under seal (*North v. Nichols*, 37 Conn. 875; *Smith v. Smith*, 45 Vt. 433), though the party has expressly promised to perform such contract. *Andrews v. Montgomery*, 19 Johns. 162.

(579) Generally debt lies whenever a sum certain is due to the plaintiff. How the obligation was incurred is immaterial, if the amount due is capable of being definitely ascertained. *Stockwell v. United States*, 18 Wall. 581; *Horns v. Semple*, 8 McLean's C. C. 150. See, also, *Lee v. Gardiner*, 26 Miss. 521; *Nash v. Nash*, 16 Ill. 79; *Snell v. Kirby*, 8 Mo. 21; *Schmertz v. Shreeve*, 62 Penn. St. 457. Thus, it is held to be the proper form of action on a promissory note (*Casey v. Barcroft*, 5 Mo. 128; *Bentley v. Dickson*, 1 Ark. 165; *Crawford v. Daigh*, 2 Va. Cas. 521); on a foreign judgment or decree (*Jordon v. Robinson*, 15 Me. 187; *Headly v. Roby*, 6 Ohio, 527; *Warren v. McCarthy*, 25 Ill. 95); on a bond conditioned for the performance of covenants (*Meakings v. Ochiltree*, 5 Port. [Ala.] 895); on a recognizance to the State in a criminal proceeding (*Green v. Dana*, 13 Mass. 493; *State v. Polson*, 26 Me. 209); on a replevin bond (*Darling v. Peck*, 15 Ohio, 65; *Early v. Owen*, 6 Munf. [Va.] 819); to recover compensation for work and labor done (*Thompson v. French*, 10 Yerg. [Tenn.] 452); against an executor to recover a legacy (*Pettigrew v. Pettigrew*, 1 Stew. [Ala.] 580); or to recover the purchase-money of lands sold under articles of agreement. *Hulseor v. Burke*, 11 Serg. & Rawle (Penn.), 238. But debt is not the proper form of action upon a bond, unless conditioned for the payment of money only (*Curle v. Pettus*, 6 Mo. 497); nor will it lie upon a promise to pay in a particular kind of "money," "funds," or "currency" (*January v. Henry*, 2 T. B. Monroe [Ky.], 58; *Deberry v. Darnell*, 5 Yerg. [Tenn.] 451; *Dungan v. Henderlite*, 21 Gratt. [Va.] 149; *Bruner v. Kelso*, 1 Bibb [Ky.], 487; *Mattox v. Craig*, 2 id. 584); nor upon a collateral promise to pay the debt of another; and this principle applies to a promise under seal. *Tappen v. Campbell*, 9 Yerg. (Tenn.) 436; *Gregory v. Thomson*, 31 N. J. L. 166.

In New Jersey, in courts for the trial of small causes, actions arising on simple contract must be brought as actions of debt, and not otherwise. *Cattin v. Payday*, 2 N. J. L. 138; *Biker v. Jacobus*, 2 id. 828; id. 83.

Covenant is the proper action to be brought on a sealed guaranty, and it is of no consequence to the maintenance of such action whether the contract is conditional or unconditional, so that it is a covenant, and not a condition merely. *Congdon v. Read*, 7 R. I. 576.

(580) See *ante*, notes 9 to 12.

Case is an action for consequential injury—that is, injury arising indirectly and consequentially from the act complained of. It was long since observed (*h*), by way of illustrating the difference between trespass and case, that, “If a man throw a log into the highway, and in that act it hits me, I may maintain trespass, because it is an immediate wrong; but if, as it lies there, I tumble over it and receive an injury, I must bring an action upon the case.” One or two instances in addition to those mentioned in preceding pages may here be given illustrating the nature and applicability of this action. Thus slander, whereby a person’s character is injured, is the subject of an action on the case, and case would be the remedy for the wrongful obstruction of a watercourse, where the cause of obstruction was an erection made on the defendant’s own land, so as to indirectly interfere with the * watercourse on the plaintiff’s land. Again, the action would be case where the defendant was [* 324] sued for an injury inflicted by the careless driving of his carriage by his servant, the wrong complained of being the negligence of the person whom he employed in the course of his employment, and the injury resulting as a consequence from it. (581)

Trover is a species of action on the case, and lies for the wrongful conversion of goods (*i*).

Detinue lies for the specific recovery of goods wrongfully detained, and damages for their detention (*k*).

Replevin is an action attended with many peculiarities, which have already been treated of at length (*l*), we will here merely repeat that it is commonly resorted to where goods have been wrongfully taken under a distress, though it has been held to apply to any unlawful taking of goods out of the possession of another (*m*). (582)

After the defendant in the action has appeared to the writ formal pleadings preparatory to a trial commence. These pleadings are alternate statements, or counter allegations in writing, relating to the claim on the one hand and the

(*h*) *Per* Lord Kenyon, *Day v. Edwards*, 5 T. R. 648.

(*i*) *Ante*, p. 256.

(*k*) *Ante*, p. 255.

(*l*) *Ante*, p. 259.

(*m*) *Ante*, p. 260.

(581) The general distinction between *trespass* and *trespass on the case* is stated to be, that for an injury, which is the direct result of an act done with force, *trespass* is the only proper remedy; while for an injury which is only the remote or secondary result of the defendant’s act, or which is not attributable to any positive or forcible act of the defendant, *case* is the appropriate remedy. *Cottrell v. Cummins*, 6 Serg. & Rawle (Penn.), 348; *Cole v. Fisher*, 11 Mass. 137; *Percival v. Hickey*, 18 Johns. 257; *Brennan v. Carpenter*, 1 R. I. 474; *Case v. Mark*, 2 Ohio, 169. When the injury sustained is the immediate result of an act done negligently, not willfully, the injured party may, at his election, treat the *act itself* as the wrong, and sue in trespass; or may treat the *negligence* as the wrong, and sue in case. *Blin v. Campbell*, 14 Johns. 432; *Gates v. Miles*, 3 Conn. 84; *McAllister v. Hammond*, 6 Cow. 342; *Baldrige v. Allen*, 2 Ired. (N. C.) 206.

Whether an action is, or is not, trespass on the case is determined by the form of the declaration, and not by the subject-matter of the suit. *Humiston v. Smith*, 22 Conn. 19. See *Agrv v. Young*, 11 Mass. 230; *Vasil v. Lewis*, 4 Johns. 450; *Taylor v. Rainbow*, 2 Hen. & M. (Va.) 423; *Wickliffe v. Sanders*, 6 T. B. Monroe (Ky.), 299; *Cornes v. Harris*, 1 N. Y. (1 Comst.) 223. Under the New York Code of Procedure every action is an action upon the case; in other words, is founded upon the particular facts set forth in the complaint. See *Minor v. Terry*, 6 How. 208.

(582) See *ante*, note 7.

defence on the other, and following in succession, until by means of them the questions to be decided between the parties are brought out in the form of issues, on which the cause may be tried and decided. The process of pleading is to compel the parties to come to an issue of fact or of law, and the rules of law directed to the mode whereby and the time within which these pleadings or written statements are to be made, irresistibly lead the parties in an action to raise the issues or questions to be decided between them, unless, indeed, either party, at some preliminary stage of the suit, chooses to abandon his claim or defence. Formerly the system or science of special pleading was one of great refinement; its rise and progress have been thus described (*n*): “The [* 325] manner of allegations in * our courts may be said to have been first methodically formed and cultivated as a science in the reign of Edward I. From that time the judges began systematically to prescribe and enforce certain rules of statement, of which some had been established at periods considerably more remote, and others apparently were then from time to time first introduced. None of them seem to have been of legislative enactment, or to have had any authority, except usage or judicial regulation; but from the perception of their wisdom and utility, they acquired the character of fixed and positive institutions, and grew up into an entire and connected system of pleading.” But though the system of pleading above spoken of in terms of not unjust eulogy was in some respects of great utility, and had been a valuable auxiliary in building up and settling the law in this country, yet it ran into such refinements and niceties, and was capable of being so much abused, for the purpose of raising purely technical objections, that it was at length deemed expedient to effect a complete change in its rules, and this was mainly done by the Common Law Procedure Act, 1852, which, while it still retained what was useful in pleading—viz., the compelling the parties in an action to come to issue, did so by provisions which, to a great extent, discarded the refinements and niceties that had prevailed, and were directed to matter of substance rather than of form. But though the more subtle rules of pleading have been swept away, it is still only by controlling the time and the manner of their allegations that the parties in an action are brought to issue. Under no system of pleading could the parties be left at large without control to arrange the points of difference between themselves. If they were so, specific issues would seldom be arrived at by persons in so hostile a situation as the plaintiff and the defendant in a suit at law. The parties are, however, under control, both as to the time and manner of their allegations, and are compelled by the system that prevails in our courts of law so to plead that they [* 326] must, sooner or * later, arrive at specific issues (*n*). Both the manner of their allegations and the time within which the parties are to make them are accordingly regulated by law and the practice of the courts, and they must proceed in their alternate statements by certain formal stages, under the cognisance and control of the court in which the action may be brought. The plaintiff must, after the appearance of the defendant is entered, declare his complaint. To this declaration of the plaintiff, the defendant, within a certain time, unless he means to let judgment go against him by default, must plead. To this pleading the plaintiff replies, and if either party

(*n*) Stephen on Pleading, 1st ed. p. 144.

(*n*) See Phillips's Letters on Pleading, 2nd ed., p. 2.

unduly hesitates and delays to plead, he may be ordered to do so by notice (*o*), at the peril of having judgment signed against him, and so the parties proceed in point of time. Neither is the manner of their allegations uncontrolled. Here steps in the science of special pleading, which is part of the law, and by the rules of which the parties are constrained to limit and point their allegations in such a way that, sooner or later, they arrive inevitably at specific issues, either of fact or of law, at distinct points of dispute, whereby the cause may be tried and decided.

The distinctive names of the successive steps in pleading are as follows:—The statement after appearance, of the cause or causes of action for which the plaintiff sues is called the “declaration;” the defendant’s allegations in answer to the declaration, the “plea;” the plaintiff’s reply to the plea, the “replication” (*p*). To these the defendant may rejoin, and the pleadings may go beyond this stage to surrejoinder, rebutter, surrebutter, &c., according to the exigencies of the case, though at the present day issues of fact are generally arrived at by the replication or the rejoinder. If there are grounds for contending that * any one of these pleadings from the declaration downwards is on the face of it substantially defective, that is to say, does not, on the facts as stated by it, present any real case or any real answer to the pleading which it professes to answer, such pleading may be “demurred” (*q*) to, and joinder in demurrer raises an issue of law, to be argued before the judges. A party, moreover, may now have leave both to plead and demur to the same pleading (*r*). (583)

A leading alteration effected in pleading by the Common Law Procedure Act, 1852, was its doing away with special demurrers, and putting in the place of them a more salutary method of controlling the statements of the parties. Demurrers were formerly divided into two classes, general and special—general where the pleading demurred to was defective in substance, special where the defect was one of form only. If a party in his pleading infringed any rule as to the form of statement, however trivial or unimportant such infringement might be, he was liable at once to be visited by a special demurrer at the will of his opponent. The main rules as to statement in pleading—for

(*o*) C. L. Proc. Act, 1852, s. 53, *post*, p. 331.

(*p*) See the provisions of C. L. Proc. Act, 1852 (s. 81), as to several matters being pleadable at any stage of the pleadings.

(*q*) Demurrer, from the Latin *demorari*, to stay, the party who demurs objecting to go

any further, because the other has not shown sufficient matter against him that he is bound to answer.

(*r*) As to pleading and demurring together, see C. L. Proc. Act, 1852, s. 80.

(583) Under the New York Code of Procedure the first pleading on the part of the plaintiff is the complaint, which unites the *bill* in equity and the *declaration* at common law. The only pleading on the part of the defendant is either a *demurrer* or an *answer*. The plaintiff is allowed a *reply*; the object of which is, to controvert and put in issue new matter set up by way of *counter-claim* in the answer. See 2 Wait's Pr. 285 *et seq.* And see *Conaughty v. Nichols*, 42 N. Y. (3 Hand) 83. As to the rules of pleading introduced by the North Carolina Code of Procedure, see *Oates v. Gray*, 66 N. C. 442. And see, generally, as to the course of pleading in civil actions under reformed codes in several of the States, *Crouther v. Elliott*, 7 Kan. 235; *Newton v. Miller*, 49 Mo. 298; *Martin v. McLean*, id. 361; *Cline v. Cline*, 3 Oregon, 355; *Wills v. Wills*, 31 Ind. 106; *Toole v. Urquhart*, 44 Ala. 646; *Horton v. Thorn*, 32 Ind. 151; *Bonney v. Bonney*, 29 Iowa, 448; *Drane v. Board of Police*, 42 Miss. 264; *Thruston v. Oldham*, 6 Bush (Ky.), 16; *McLeran v. Morgan*, 27 Ark. 148; *Bloom v. Lehman*, id. 489; *Litchfield v. Daniels*, 1 Col. T. 268; *Warren v. Quill*, 8 Nev. 218; *Trisler v. Trisler*, 38 Ind. 282; *Gordon v. Swift*, 39 id. 212.

example, those against uncertainty, argumentativeness, or doubleness in pleading—so far as they were applied to their legitimate objects, worked well and usefully; but, unfortunately, the smallest infractions of any one of them, though not in the least impeding the course of the cause, or in the least interfering with a decision of it on the merits, were perpetually made subjects of special demurrer, and, in addition to this, many fictitious and needless averments, which admitted of no denial, and on which nothing turned, were required to be made, to satisfy some theory of form only, which had been established to be law. Now, the Common Law Procedure Act, 1852, retained [* 328] general * demurrers, but put an end to special demurrers, substituting for them a controlling power, vested in the court or a judge, to amend or strike out pleadings on the application of the opposite party, if they were so framed as to prejudice, embarrass, or delay the fair trial of the action; and as to needless and fictitious averments, the act swept them away altogether.

We have been above speaking of those general clauses of the act relating to all pleadings at any stage of the cause. The act also contains special provisions relating to particular matters in pleading.

By the provisions as to the language and form of pleadings in general, the following simplifications amongst others have been effected: statements which need not be proved, such as the statement of time, quantity, quality, and value, where these are immaterial, the statement of acts of trespass having been committed with force and arms, and against the peace of our lady the queen, the statement of premises which need not be proved, and all statements of a like kind, are to be omitted (*s*). Also either party may object by demurrer to the pleading of the opposite party that such pleading does not on the face of it set forth sufficient ground of action, defence, or reply, as the case may be; and where issue is joined on such demurrer, the court may proceed to give judgment according as the very right of the cause and matter in law shall appear unto them without regarding any imperfection, omission, defect in or lack of form, and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in or lack of form (*t*).

No pleading shall be deemed insufficient for any defect which could formerly have been taken by special demurrer only (*u*).

If any pleading be so framed as to prejudice, embarrass, or delay the fair [* 329] trial of the action, the opposite party * may apply to the court or a judge to strike out or amend such pleading, and the court or a judge may make such order respecting the same, and also respecting the costs of the application, as may seem fit (*x*).

It should here be observed that the Procedure Act of 1852 makes provision for the parties to an action raising questions of fact without any pleadings, if they are agreed as to the question or questions of fact to be decided between them, and this is to be done after writ issued by order of a judge, upon his being satisfied that the parties have a *bonâ fide* interest in the decision of such question or questions, and that the same is or are fit to be tried; but as the basis of this proceeding is the agreement of the litigant parties as to what may be the question or questions to be decided between them, it is not of frequent occurrence. Provision is also made for the parties in an action by consent and

(*s*) C. L. Proc. Act, 1852, s. 49.

(*t*) S. 50.

(*u*) S. 51.

(*x*) S. 52.

order of a judge to state any question or questions of law in a special case for the opinion of the court without any pleadings. It is to be observed that to raise a question of law in a special case the parties must agree upon all the facts, and as it is but seldom that the litigant parties can do this, it is not uncommon for the special case to be referred to some person to settle for the parties, he having power to receive evidence and to determine those facts which are disputed between them (y). Provisions are likewise contained in the Common Law Procedure Act, 1854, relating to compulsory references to arbitration by order of the court or a judge, which have been found most valuable in saving the time of the courts, and relieving the parties from unnecessary expense (z). An order to refer, though it may be made at a subsequent stage, is frequently made before any pleading in the action. The application to refer is open to either party, and the court or a judge will make such order upon being satisfied that *the question in dispute involves wholly or in part matters [* 330] of mere account which cannot be conveniently tried in the ordinary way.

The time within which the parties are compelled to proceed with their pleadings is governed by the provisions of the Procedure Act of 1852, and by the rules of practice relating thereto; the general principle applicable being that either party can be forced on to take the next step in pleading within a certain time, until issue joined, or must abandon his claim or defence, as the case may be. The plaintiff is deemed out of court unless he declare within a year after the writ of summons is returnable, that is, *ipso facto*, without anything being done to force him on by the defendant; but he may be compelled to declare at an earlier period, or submit to a judgment against him which puts an end to the action, and is called judgment of *non pros*. The plaintiff has the whole of the term next after the appearance is entered for declaring, but when that time has expired, on four days' notice being given him, as prescribed by sect. 53 of the Procedure Act of 1852, if he fail to declare within such period, judgment of *non pros*. may be signed against him unless he has obtained by judge's order further time to declare. A plaintiff may obtain further time to declare by order of the court or a judge on application made for that purpose, or some order in the cause may suspend the proceedings for a time, and this remark applies not only to declarations but to all the subsequent pleadings and to each party in the cause, *viz.*, that the time may be extended expressly or impliedly by order.

Application for time to plead and respecting very many other matters incidental to the proceedings of either party in the cause are disposed of at judge's chambers by summons and order; the summons is taken out by the party applying and served on his opponent, and in the body of it requires him to attend before the judge to show cause, *ex. gr.* "why the defendant should not have a *week's further time to plead," or as the case may be. These [* 331] summonses are attended at judge's chambers in some cases before a judge, in others before a master (a) of one of the courts, and the order is drawn up according to the decision, which is usually indorsed on the back of the summons. In many cases the opposing party indorses a consent on the

(y) C. L. Proc. Act, 1852, ss. 42—48.

(a) See stat. 30 & 31 Vict. c. 63.

(z) C. L. Proc. Act, 1854, ss. 3—17.

summons, in which case the order is drawn up without attending before the judge.

In order to force on the opposite party (if he delay to proceed) a notice must now be given requiring him "to declare, and reply, rejoin, or as the case may be, within four days, otherwise judgment" (*b*). Such notice is either delivered separately or indorsed on the pleading to which the opposite party is required to reply, rejoin, or otherwise.

The regular time for pleading in bar to the action, where the defendant is within the jurisdiction, is eight days (*c*), and in order to compel the defendant to plead, a notice requiring him to do so in eight days, "otherwise judgment," may, whether the declaration be delivered or filed, be indorsed on it, or may be separately delivered (*d*). A plea in abatement must be pleaded in four days. There are also rules as to the time for pleading after amendment (*e*); where the amendment of any pleading is allowed no new notice to plead thereto shall be necessary, but the opposite party is bound to plead to the amended pleading within the time specified in the original notice to plead, or within two days after amendment, whichever shall last expire, unless otherwise ordered by a court or judge, and in case the amended pleading has been pleaded to before amendment and is not pleaded to *de novo* within two days after amendment or within such other time as may be allowed, the pleadings [* 332] originally pleaded thereto * shall stand and be considered as pleaded in answer to such amended pleading.

We have already seen that the plaintiff may have notice given to him to reply, rejoin, or as the case may be, and he must do so on such notice being given him, unless further time is allowed by judge's order. The long vacation, which includes the time between Aug. 10 and Oct. 24 in every year, is excepted from the period of pleading.

As regards the computation of time—in all cases in which any particular number of days not expressed to be clear days is prescribed by the rules or practice of the court, the same are reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time is reckoned exclusively of that day also; the days between Thursday next before and the Wednesday next after Easter-day and Christmas-day and the three following days are not reckoned or included in any rules, notices, or other proceedings in general, except notices of trial or notices of inquiry (*f*).

In any cause in which there have been no proceedings for one year from the last proceeding had, the party, whether plaintiff or defendant, who desires to proceed, is required to give a calendar month's notice to the other party of his intention so to do (*g*).

Supposing, however, the pleadings to proceed, the declaration must (as also must every other pleading) be entitled of the proper court, that is to say, the court in which the action is brought, and of the day and the month of the

(b) C. L. Proc. Act, 1852, s. 58.

(c) C. L. Proc. Act, 1852, s. 68.

Where the plaintiff seeks to recover a liquidated demand in money, judgment by default, for want of a plea, is final. *Id.* s. 98.

(d) *Id.* ss. 62, 63.

(e) *Id.* s. 90.

(f) See Rules Hil. T. 1853, *reg.* 174, 175.

(g) *Reg.* 176.

The summons of a judge, if no order be made thereupon, is not to be deemed a proceeding within this rule. Notice of trial, though afterwards countermanded, shall be deemed a proceeding within it.

year when the same was pleaded (*h*), and a * venue must be stated in the margin, being the county where the action is to be tried. A [* 333] formal commencement and a conclusion are also prescribed for the declaration (*i*).

The venue laid in the declaration is either transitory or local; local where the cause of action is of such a nature that it could only have arisen in a particular place or county, and transitory where it might have arisen anywhere. Thus, in an action for an injury to real property, the venue is local; while in an action for debt or breach of contract, which is "*nullius loci*," and for an injury to the person or personality, it is transitory.

Such is the general distinction in regard to venue. It should however be observed that sometimes, though the cause of action is fixed to no locality within the meaning of the above definition, the venue is nevertheless required to be local, *ex. gr.*, where it is made so by statute. Where the venue is transitory it may be laid in any county, subject to its being changed by order of a judge on special grounds. Where local, it must be laid in the county where the cause of action arose, but the court or a judge may allow a suggestion to be entered for the trial of the cause in a county other than that in which the venue is laid.

After the formal commencement of the declaration, the statement of the cause of action follows. It is not, as one unacquainted with legal proceedings might imagine, a narrative of all the circumstances of the case out of which the complaint has arisen, but it is a statement of such facts only as are essential to constitute a cause of action on the part of the plaintiff against the defendant. In pleading, the legal effect and operation of things is looked * at; what is matter of evidence merely is reserved for the trial, and [* 334] all that is required in a declaration, therefore, is that it should state in an accurate and traversable (*j*) manner those facts which constitute the cause of action against the defendant. This statement may be sometimes made shortly and in general terms with the aid of language of legal import, and sometimes by a more extended statement, but should always be made without unnecessary detail or prolixity.

The following examples, to show the mode of declaring, may be adduced:—A merchant applies to a manufacturer to supply him with cotton prints; a correspondence ensues as to the price to be given for the goods, the quality of the wares, the time during which they are to be supplied, and the period of credit to be allowed for payment. The terms of the contract are at length adjusted. The goods are sent and received by the merchant, and the period of credit has expired, but he fails to pay the price for them, and an action is commenced against him. Now the cause of action arising out of the above facts would be briefly stated in the declaration to be for "money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant" (*k*).

(*h*) C. L. Proc. Act, 1853, s. 54.

(*i*) Every declaration shall commence as follows, or to the like effect: [Venue] "A. B. by E. F. his attorney [or 'in person,' as the case may be,] sues C. D. for (here state the cause of action);" and shall conclude as follows, or to the like effect: "And the plaintiff claims £—— (or if the action is brought to recover specific goods, the plaintiff 'claims a return')." C. L. Proc. Act, 1853, s. 59.

(*j*) That is, capable of being denied or put in issue.

(*k*) The above belongs to a class of counts called the common counts or money counts, of which several examples are given in Schedule (B.) to the Com. Law Proc. Act, 1853. They used to be called the "*indebitatus* counts," because they begun by stating that the defendant was indebted to the plaintiff for which, the words "money payable by the

If this cause of action were denied, and the terms of the contract were disputed, with a view to reducing the amount charged, or for any other reason, the facts and circumstances of the case, including the correspondence, would be proved at the trial, the pleadings presenting in the simplest form the issue as to which the evidence would be given.

[* 335] Again, a horse was sold at a fair after much bargaining, * in the course of which the seller said that the horse was sound, and quiet to ride. Now every affirmation at the time of the sale of a personal chattel is a warranty, provided it be so intended, and whether it was so intended or not, in the case put, would be a question for the jury on evidence of the circumstances attending the sale, and of what then took place between the parties; the buyer, however, in suing the seller for breach of warranty, would in his declaration simply state "that the defendant by warranting a horse to be then sound and quiet to ride, sold the said horse to the plaintiff, yet the said horse was not then sound and quiet to ride," it being for the jury to decide, if the warranty were denied by an apt plea, whether the statements made by the seller at the time of the sale were intended as a warranty or not.

Again, plaintiff sues defendant for not loading the plaintiff's ship pursuant to a charter-party. Such a case might involve many details, yet the statement of the cause of action would be made in the following form, without any superfluous narration:—"That the plaintiff and defendant agreed by charter-party that the plaintiff's ship, called the 'Ariel,' should with all convenient speed sail to R., or so near thereto as she could safely get, and that the defendant should there load her with a full cargo of tallow or other lawful merchandise, which she should carry to H., and there deliver, on payment of £—— per ton, and that the defendant should be allowed ten days for loading, and ten for discharge, and ten days for demurrage if required, at £—— per day, and that the plaintiff did all things necessary on his part to entitle him to have the agreed cargo loaded on board the said ship at R., and that the time for doing so had elapsed, yet the defendant made default in loading the agreed cargo;" the terms set forth in the declaration corresponding with those of the charter-party.

The above forms of declaration relating exclusively to contracts, an instance [* 336] may next be given of a declaration * for wrong, independent of contract. In an action for diverting a watercourse from a mill, the declaration might allege:—"That the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same, and the defendant, by cutting the bank of the said stream, diverted the water thereof away from the said mill." It is impossible to read the above form without perceiving that it is framed with the extremest brevity, and so as to invite clear and simple issues on the main points likely to arise in such an action; as for instance, on the pleas of not guilty, and a denial of the right asserted by the plaintiff, and, issues being joined on these pleas, a mass of evidence, oral and documentary, reserved for the occasion when it could be once for all best investigated, viz., on the trial of the cause, might be forthcoming.

Statutory forms (i) such as the foregoing, which are models of clearness and comprehensive brevity, should always be followed, as far as the particular cir-

defendant to the plaintiff" are now substituted.

(i) C. L. Proc. Act, 1852, Sched. (B.)

cumstances of the case may admit. It is, indeed, expressly provided (*m*) that they shall be sufficient, and may be used, with needful modifications. Sometimes, however, it may be advisable to plead at length, instead of using a more concise form. Thus it is an old rule of pleading that the legal operation and effect of a written instrument should be stated, but there are cases in which it may be advisable to set out the whole instrument in words and figures from the beginning to the end; for instance, a deed may, if a particular construction is put upon it, give the plaintiff a cause of action against the defendant, and the construction of any part of the deed may depend on a nice consideration of all its terms. The plaintiff in such case may think proper to set out the whole deed, whatever be its length, in his pleading, in order to bring it at once before the court, and thus give the defendant an opportunity of raising the question by *demurrer, whether on a true construction of the deed [* 337] there is a cause of action or is not.

The declaration must omit no allegation that is material to the cause of action. Thus a declaration against a defendant for breach of a contract by him to do certain work for the plaintiff in a careful and proper manner, would, if the contract were not under seal, be bad in substance, unless it stated a consideration for the defendant's undertaking.

One or two remedial provisions relating to declarations may here specially be noticed. A difficulty in pleading formerly existed in declaring on the breach of an executory contract, from the necessity of stating the fulfilment or an excuse for the non-fulfilment of every condition precedent to the defendant's obligation to perform it. Now, it was often difficult to say whether particular stipulations were conditions precedent or not, and especially where no stress had been laid upon them as such between the parties. In declaring for breach of a contract containing many clauses, and having long specifications attached to it, it was necessary to pick out of the contract every stipulation that might be held to be a condition precedent, whether it concerned an act to be done, an act to be omitted, or an event to happen, and precisely and separately to aver the performance of it, or an excuse for its non-performance. Hence much perplexity was sometimes caused, and, to remedy the evil adverted to, it has been provided that "it shall be lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent, the performance of which he intends to contest" (*n*).

Again, formerly in an action for libel and slander, where the words or matter complained of were actionable only * with reference to extrinsic circumstances, it was necessary to state such extrinsic circum- [* 338] stances in the declaration by way of prefatory averment. It was often a difficulty to know how much or how little to state of the circumstances, or in what way to put them, as a matter of pleading, to support the innuendo or meaning attached to the words or matter in a subsequent part of the declaration. If the prefatory averment did not support the meaning attached, with almost logical exactitude, the whole declaration might have been held to be bad. To remedy this s. 61 (*o*) of the Common Law Procedure Act, 1852, has

(*m*) C. L. Proc. Act, 1852, s. 91.

(*n*) C. L. Proc. Act, 1852, s. 57.

(*o*) Which should be read in connection with the appropriate forms in Schedule (B.)

enacted that, "in actions for libel and slander, the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient."

Inasmuch as each of the money counts (*p*) is worded in very general terms, and may include several transactions (for instance, the count for "goods sold" may relate to several sales of goods), it is deemed proper that the defendant should be informed as to the items of the plaintiff's claim, and the plaintiff, accordingly, is required to deliver or file with every declaration (*q*), unless the writ of summons has been specially indorsed, full particulars of his demand [* 339] under such claim (*r*). There are also copious * statutory provisions in certain other cases as to particulars; and particulars, also, may be obtained by means of a judge's order, on special grounds, in cases where they are not ordinarily given.

Though several causes of action may be conjoined in one declaration, the court or a judge has power to strike out or amend, on application made for that purpose, counts founded on the same cause, and thus to prevent a useless and inconvenient repetition of the same grounds of claim, with a difference of form merely. Indeed, the rules of Trinity Term, 1853, make express provision against the unnecessary repetition, not only of counts, but of pleas and subsequent pleadings. Thus, reg. 1 directs that (except as afterwards provided) several counts on the same cause of action shall not be allowed, and any count or counts used in violation of this rule may, on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck out or amended by the court or a judge, on reasonable terms. Reg. 2 also provides that "several pleas, replications, or subsequent pleadings, or several avowries or cognizances (*s*) founded on the same ground of answer or defence, shall not be allowed, provided that, on application made to strike out any count, or objection taken to the allowance of several pleas, replications, or subsequent pleadings, avowries, or cognizances, as being in violation of this rule, the court or judge may allow such of them, though founded on the same ground of answer or defence as may appear to be proper for determining the real question in controversy between the parties, on its merits, subject to reasonable terms." Moreover, "when on the trial of a cause (no rule or order having been previously made as to costs) there is more than one count, plea, replication, or subsequent pleading, avowry, or cognizance, on the record [* 340] * founded on the same cause of action, or ground of answer or defence, the judge before whom the cause is tried may certify to that

(*p*) *Ante*, p. 334 (*k*).

(*q*) *i. e.*, with every declaration containing causes of action such as those set forth in the C. L. Proc. Act, 1852, Sched. (B.), and numbered from 1 to 14 inclusive.

(*r*) See Rules Hil. Term, 1853; *reg.* 19, 20, 21, relating to particulars of demand, and also to particulars of set-off with the plea of

set-off. These particulars are very usually a short business-like statement in the form of an account, with dates of the different items claimed.

(*s*) Pleadings in replevin, acknowledging, and justifying the taking of the goods, *ante*, p. 261.

effect on the record, thereby making the party who has so pleaded liable for the costs thus uselessly incurred (*t*).

Pleas are either in abatement or in bar; a plea in abatement does not profess to answer the claim on the merits, but seeks to abate the action on the ground of some defect or informality in its inception, which disentitles the plaintiff to sue. The only plea in abatement much known in practice is that of non-joinder of co-defendants. If such a plea were well founded, it formerly had the effect of quashing the writ and declaration in the particular action. It gave the names of those who ought to have been joined as defendants, and the plaintiff had to commence a fresh suit against all who should have been joined. It was accordingly said to give the plaintiff a better writ. Now, however, statutory provisions have rendered it unnecessary to commence the action *de novo* after a successful plea of non-joinder—the writ and declaration being amendable by inserting in them the names of the defendants who ought to have been originally joined (*u*). The plea in abatement has to be verified by affidavit, and must state that the person or persons whose non-joinder is pleaded are resident within the jurisdiction of the court, and the place of residence must be stated with convenient certainty in the affidavit verifying the plea.

Pleas in bar are pleaded to the plaintiff's claim on the action. They may seek to meet the cause of action allowed in the declaration either by denial or by some other * answer, showing that the plaintiff has no right to maintain the action against the defendant. Pleas in bar are broadly [* 341] divided into pleas in denial and pleas in confession and avoidance. Such a plea may deny or traverse one or more of the material allegations in the declaration, or it may admit the case as there stated, and bring forward new matter in answer to it. Let us suppose that the plaintiff, the drawer of a bill of exchange, declared against the defendant as acceptor of the bill. A plea that he (the defendant) did not accept the bill would be a plea in denial or traverse of the acceptance as alleged. A plea that before action the defendant had satisfied and discharged the plaintiff's claim by payment would be a plea in confession and avoidance. The latter plea would admit the bill to have been accepted by the defendant, and that a complete cause of action had accrued against him, but would avoid it by matter subsequent, *viz.*, payment in discharge. It is not, however, essential to a plea in confession and avoidance that it should admit a cause of action to have once accrued. If the plea admit the *prima facie* case stated in the declaration, it would still be so designated, although the new matter brought forward by it should go to show that there never was a cause of action against the defendant in respect of the matter declared on. Thus, in an action on a bill of exchange, if the defendant pleaded that it was given for an illegal consideration (stated in the plea), that would confess the drawing and acceptance, but show the bill to have been invalid *ab initio*, as between drawer and acceptor. In an action for diverting a watercourse, were the defendant to plead not guilty and also that the defendant diverted the watercourse in the exercise of a prescriptive right at particular

(*t*) Rules Trin. T. 1853, *reg.* 3.
The C. L. Proc. Act, 1852, enacts (s. 86), that all objections to the pleading of several pleas, replications, or subsequent pleadings, or several avowries or cognisances, on the

ground that they are founded on the same ground of answer or defence, shall be heard upon the summons to plead several matters.
(*u*) C. L. Proc. Act, 1852, ss. 88, 89.

times to irrigate his meadow, the first plea would be that form of denial called the "general issue," while the second plea would be in justification of the act complained of, and show that no cause of action had ever existed in respect of [*342] it; still it * would admit the diversion in point of fact, and be described as a plea in confession and avoidance. At a period now somewhat remote (*u*), such justification could have been given in evidence under the plea of "not guilty," or "the general issue."

With regard to the "general issue," some explanation may here be proper. The term is still in use, though the operation and effect of the plea was greatly limited by the rules of Hil. Term, 4 Wm. 4, and again by the rules of Trin. Term, 1853. In form the general issue may perhaps be described as a denial of such allegations as constitute the characteristic or leading feature of the claim. Thus, in "promises" it would be "*non assumpsit*," in case and trespass, "not guilty," in detinue, "*non detinet*." "*Nil debet*" was formerly the general issue in debt, but is now no longer allowed (*x*). The evidence admissible under the general issue, or in other words, the defences let in by it formerly varied in extent in different actions; in the majority of cases, however, this plea had the effect not only of denying the facts stated in the declaration, but of letting in evidence appropriate to pleas in confession and avoidance. It is needless to particularise with precision what was admissible under the general issue before the rules of Hil. Term, 4 Wm. 4, as its operation is now regulated by the rules of Trin. Term, 1853, from which the following propositions with examples and illustrations of them have been taken:—

1. In any action on simple contract (except as presently specified) the plea of *non assumpsit*, or a plea traversing the contract or agreement alleged in the declaration, operates only as a denial in fact of the express contract, promise, or agreement alleged in the declaration, or of the matter of fact from which it may be applied by law (*y*). *Ex. gr.* In an action on a warranty such plea [*343] will operate * as a denial of the fact of the sale and warranty having been given, but not of the breach; and in an action on a policy of insurance of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties (*z*). In an action against a carrier or other bailee for not delivering or not safely keeping goods, or not returning them on request, and in an action against an agent for not accounting, such plea will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach.

To any cause of action to which the plea of "never was indebted" is applicable (*a*), and to any of a like nature, the plea of "*non assumpsit*" is now inadmissible, and the plea of "never was indebted" operates as a denial of those matters of fact from which the liability of the defendant arises; *ex. gr.*, in an action for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery in point of fact; in an action for money had and received it will operate as a denial both of the receipt of the money and of the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff (*b*).

(*u*) Namely, before the Rules, Hil. Term, 4 Will. 4.

(*x*) Rules, Trin. T. 1853, *reg.* 11.

(*y*) *Reg.* 6.

(*z*) *Ante*, pp. 212, *et seq.*

(*a*) As provided in Schedule (B.) (No. 36) of the C. L. Proc. Act, 1853.

(*b*) *Reg.* 6.

In an action upon a bill of exchange or promissory note, the plea of "*non assumpsit*" and "never indebted" is inadmissible. In any such action, therefore, a plea in denial must traverse some matter of fact; *ex. gr.*, the drawing, making, indorsing, accepting, presentment, or notice of dishonour of the bill or note (*c*).

2. In every species of action on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be * either void or voidable in point of law on the [* 344] ground of fraud or otherwise, must be specially pleaded; *ex. gr.*, infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c., a bill or note by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded (*d*).

3. In an action on a specialty or covenant, the plea of "*non est factum*" operates as a denial of the execution of the deed in point of fact only, and any other defence must be specially pleaded, including matters which make the deed absolutely void as well as those which make it voidable (*e*). In such an action matter in confession and avoidance must also be pleaded specially (*f*).

4. In an action for tort, the plea of not guilty operates as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, but not of the facts stated in the inducement, and no other defence than such denial is admissible under that plea; all other pleas in denial must take issue on some particular matter of fact alleged in the declaration (*g*). *Ex. gr.*, in an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, but not of the plaintiff's right of way. In an action for slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, and * with reference to the plaintiff's office, profession, or trade, but it [* 345] will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. In an action for an escape, the plea of the general issue will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. And in an action against a carrier, the same plea will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or for the purpose for which they were received.

Thus much as to the effect of the plea of not guilty generally. It may be proper to add that in an action for trespass to land, this plea operates as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially (*h*). That in an action for taking, damaging, or converting the plaintiff's goods, the

(*c*) *Reg.* 7.

(*d*) *Reg.* 8.

(*e*) *Reg.* 10.

(*f*) *Reg.* 12.

(*g*) *Reg.* 16.

(*h*) *Reg.* 19.

plea of not guilty operates as a denial of the defendant having committed the wrong alleged by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein (*i*). And that in an action for detaining goods, the plea of *non detinet* operates as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial is admissible under that plea (*k*). A defendant sued in tort is sometimes empowered by statute to plead the general issue, and to give the special matter of defence in evidence under it, and in any such case he is required to insert in the margin of his plea a reference to the particular enactment upon which he relies, otherwise such plea will be taken not to have been pleaded by virtue of any act of parliament; and such memorandum is [*346] afterwards inserted * in the margin of the issue and of the *nisi prius* record (*l*).

The *nisi prius* record made upon parchment for the purpose of the trial, showing the pleadings and issues joined, and delivered to the proper officer of the court in which the cause is to be tried.

5. In an action of tort, as in an action of contract, all matters in confession and avoidance must be specially pleaded (*m*).

6. The last of the pleading rules to be here noticed, applies to all actions by and against the assignee of a bankrupt or insolvent, or by an executor or administrator, or by a person authorised by act of parliament to sue or be sued as a nominal party, and directs that the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any such case be considered as in issue unless specially denied (*n*).

In answer to the declaration, or other subsequent pleading of the plaintiff, a defendant may, by leave of a judge (*o*), plead as many several matters as he shall think necessary for his defence, upon an affidavit if required to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded by him by way of confession and avoidance are respectively true in substance and in fact (*p*). In general, however, leave to plead several matters to the declaration is allowed or disallowed by a judge on consideration of the nature of the different pleas as appearing on the face of them, no affidavit such as above mentioned being required; the object aimed at is to get a clear statement of each defence intended to be relied on, and leave it to be tested on issue joined on the evidence adduced at the trial.

[*347] * By sect. 84 of the Common Law Procedure Act, 1852, the following pleas, or any two or more of them, may be pleaded together as of course, without leave of the court or a judge, viz., a plea denying any contract or debt alleged in the declaration, a plea of tender as to part, a plea of the statute of limitations, set-off, bankruptcy of the defendant, *plene administravit*, *plene administravit præter*, infancy, coverture, payment, accord and satisfaction, release, not guilty, a denial that the property, an injury to which is complained of, is the plaintiff's, leave and licence, son assault demesne, and any

(i) Reg. 20.

(k) Reg. 15.

(l) Reg. 31.

(m) Reg. 17.

(n) Reg. 5.

(o) C. L. Proc. Act, 1852, s. 81.

(p) There is no similar provision in s. 81 with regard to plaintiffs, but there is a general provision applicable both to plaintiff and defendant that the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue.

other pleas which by rule or order may from time to time be added to the foregoing list.

Of the pleas above designated some may be thought to need a brief explanatory notice. A plea of "the statute of limitations" is applicable where the action has not been brought within a certain time after accrual of the cause of action, limited by statute; for example, if the action be brought on a simple contract, such a plea would be that the alleged cause of action did not accrue within six years before suit (*q*); or, if on a specialty, not within twenty years prior thereto (*r*). The plea of "*plene administravit*" is applicable where an executor or administrator would set up in answer to a claim against him that he has fully administered the assets of the testator or intestate. The plea of "*plene administravit præter*" applies where this defence is relied on by a personal representative, that he has administered all but a certain portion of the assets, the amount of which he either pays into court or meets by some outstanding claim of a higher nature than the *plaintiff's. The plea of [* 348] son assault demesne is where the defendant in an action for assault pleads that the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence.

Payment into court is a plea of great practical importance, and may be pleaded in any action except for assault, battery, false imprisonment, libel, slander, malicious arrest, malicious prosecution, or debauching the plaintiff's daughter or servant (*s*). Various statutes specially provide for payment into court in particular cases, as for instance, under Lord Campbell's Act (9 & 10 Vict. c. 93), and 27 and 28 Vict. c. 95, s. 2, relating to actions for compensation to the family of a person killed by accident. Further, a plea of apology and payment into court is allowed under 6 & 7 Vict. c. 96, in certain actions for libel. The Common Law Procedure Act, 1860, s. 25, also contains provisions as to payment into court in actions on money bonds and for detainer. No other plea besides that of payment into court can, however, be pleaded with it to the same part of the declaration.

The plea of payment of money into court admits a cause of action, and brings the money into court in satisfaction of the matter pleaded to. The practical effect, however, of the plea of payment into court, as an admission, varies very much with the nature and form of the declaration to which it is pleaded. For example, to a declaration for breach of a contract, where the contract is specially declared on, it would admit the contract as stated, and the breach to which it was pleaded; but to a declaration containing the common money counts, each of which may include several contracts under its general terms, such as money lent, goods sold, work done at different times, the plea of payment into court as to part of the money claimed may be pleaded, and never indebted to the residue; the effect of the admission by the former plea in such case not *amounting to more than that on some [* 349] contract or other of the kind mentioned in the declaration money is due to the amount of the sum paid into court. An *indebitatus* count, as we have before observed (*t*), is not necessarily confined to one contract, but may

(*q*) 21 Jac. 1, c. 16, s. 3, which is the principal statute of limitations as regards personal actions. It has been amended in various respects by the 4 Ann. c. 16, ss. 17—19; 9

Geo. 4, c. 14, ss. 1—4, 6; 19 & 20 Vict. c. 97, ss. 9—14.

(*r*) 8 & 4 Will. 4, c. 42, s. 8.

(*s*) C. L. Proc. Act, 1852, s. 70.

(*t*) *Ante*, p. 338.

extend to an indefinite number of contracts between the parties to the action; and when, therefore, the defendant pays money into court on such a count, he in effect says to the defendant, I admit that I owe you the sum paid into court upon some contract which may be comprehended in your count, but if you say I owe you more on any contract, prove that contract. So payment of money into court to a declaration upon a special agreement, admits the contract and the breach, for since the declaration contains but one contract, the payment into court must admit that contract by which alone anything is claimed to be due from the defendant to the plaintiff (u).

So in an action of tort the declaration may be so framed as to make a payment of money into court an admission of the particular cause of action sued for, and also of the breach. The payment of money into court in such an action may, according to the form of the declaration, be subject either to the rule applicable to special contracts, or to the rule applicable to the general *indebitatus* counts, as above stated.

Application to plead several matters is made by taking out a summons before a judge at chambers, calling on the plaintiff to show cause why the defendant should not be at liberty to plead the several matters annexed, and an abstract of the proposed plea is annexed to the summons. The same method is pursued in asking for leave to plead or demur, and also as to the subsequent pleadings where several matters have to be replied, and so forth.

[*350] Equitable defences were first allowed to be pleaded in *actions at law by the Common Law Procedure Act, 1854. By sect. 83 of that act, it is lawful for a defendant or the plaintiff in replevin in any cause in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence, and such defence may accordingly be received by way of plea, provided that it begin with the words "for defence on equitable grounds," or words to the like effect. Sect. 84 relates to grounds of equitable defence arising after the period for pleading has elapsed. Sect. 85 relates to equitable replications, and sect. 86 provides that in case it shall appear that any such equitable plea or equitable replication cannot be dealt with by a court of law, so as to do justice between the parties, the same may be struck out, on reasonable terms.

As regards the construction of the above sections it is now settled that the plea setting up a defence on equitable grounds must state such facts as would entitle the defendant to an unconditional injunction in equity, that is to say, he must show such a case as would induce a court of equity at once unconditionally to restrain the plaintiff from proceeding at law. The object of the enactment which gave effect to equitable pleas in a court of law was to enable a defendant instead of filing a bill in equity to restrain the plaintiff from proceeding at law, at once to plead the matter which would have entitled him to equitable relief, as an answer to the action. But one of the earliest restrictions imposed on the use of equitable pleas by the courts of law was that, unless the effect of the plea was to furnish a complete answer to the action and terminate the litigation, it should not be allowed (v).

The replication follows the plea; and at this stage of the proceedings issue is

(u) *Per Jervis, C. J., Perren v. Monmouth-shire R. Co.*, 11 C. B. 858, 862—8.

(v) *Wakley v. Frogatt*, 2 H. & C. 639.

very commonly joined between the parties — either issues of law, of fact, or of both.

* An issue in law is arrived at by joinder in demurrer, the demurrer [* 351] stating simply that the declaration “is bad in substance;” in the margin of his demurrer the plaintiff has, however, to specify some substantial matter of law intended to be argued, and if he omit to do so, or if the ground stated be frivolous, the demurrer may be set aside. Supposing the demurrer to stand, the joinder of demurrer would be to the effect that the pleading demurred to “is good in substance,” and would complete the issue of law to be tried by the court (x).

Joinder of issue of fact may be effected by either party pleading in answer to the plea or subsequent pleading of his adversary that he joins issue thereon (y), and such form of joinder of issue is to be deemed to be a denial of the substance of the plea or other subsequent pleading and an issue thereon, and in all cases where the plaintiff's pleading is in denial of the pleading of the defendant or some part of it, the plaintiff may add a joinder of issue for the defendant. A party is not, however, obliged in proceeding to issue to deny the whole of his adversary's pleading; he may, if he prefers it, traverse separately any material allegation in such pleading (z).

We have before said that an issue of fact is commonly arrived at by the time the replication is reached, the plaintiff joining issue on the pleas; but it may be requisite for the plaintiff's case (and the same remark would apply to either party at any of the subsequent pleadings), that he should reply in confession and avoidance of the plea instead of joining issue; and to a plea in confession and avoidance the defendant would have to rejoin, or the plaintiff might desire to join issue, or separately to traverse one or more material allegations in the plea, and also to reply in confession and avoidance, in which case he would have to obtain leave of a judge for that purpose. Thus the plaintiff would apply for leave to *reply to several matters in the [* 352] following case: suppose an action to be brought for goods sold and delivered by the plaintiff to the defendant, and the defendant to plead that at the time of making the contract he was an infant within the age of 21 years, and suppose the defendant at the time of the action brought to be of age, and that it is doubtful whether he was not so at the time of making the contract, such question might be raised by the plaintiff's joining issue on the plea. But the plaintiff may also have grounds for contending that if the defendant were an infant at the time of the contract, the goods supplied were necessities for the defendant suitable to his then estate, degree, and condition, and in such case he would reply in confession and avoidance of the plea that they were such necessities (a). Again, there may have been before action some correspondence between the plaintiff and the defendant after the defendant came of age, and it may be a question on such correspondence whether the defendant has not ratified the contract, in which case the plaintiff would wish to plead also that the defendant after he had attained his full age of 21 years and before action, by a writing made and signed by him, ratified and confirmed the said contract. These replications containing distinct grounds of answer to the defendant's plea, would no doubt be allowed almost as of course on the plaintiff taking out

(x) C. L. Proc. Act, 1852, s. 89.

(y) *Id.* s. 79.

(z) *Id.* ss. 76—78.

(a) See *Ryder v. Wombwell*, L. R. 4 Ex. 82.

a summons calling on the defendant to show cause why he should not be at liberty to reply the several matters specified in the abstract annexed to the summons, and such abstract might be in this form: 1. Joinder of issue; 2. That the goods were necessities; 3. Ratification of the contract by the defendant after he came of age.

During the progress of a cause there are many proceedings of an auxiliary character which the law allows to the parties in furtherance of justice and in aid [* 353] of their preparations for the trial. Of such proceedings some * relate to the discovery and inspection of documents and the delivery of written interrogatories. A power to order inspection of documents was sometimes exercised by a court of law before the passing of the statute 14 & 15 Vict. c. 99, but by s. 6 of that act it was extended to all cases in which equity would order a discovery, it being thereby provided that the court or a judge might, on application made for such purpose by either of the litigants, in an action or other legal proceeding, compel the opposite party to allow to the applicant an inspection of all documents in his custody or under his control relating to the action. Such power being exercisable in all cases in which, previous to the passing of that act, a discovery might have been obtained by filing a bill, or by any other proceeding in a court of equity at the instance of the party making the application. The provisions referred to, it must be observed, do not give power to compel discovery, but are confined to inspection merely; they were, however, shortly followed by those contained in sect. 50 of the Common Law Procedure Act, 1854, enacting that, upon the application of either party to any cause or other civil proceeding in any of the superior courts, upon an affidavit by such party of his belief (*b*) that any document to the production of which he is entitled for the purpose of discovery or otherwise is in the possession of the opposite party, the court or a judge may order that the party against whom such application is made, or if such party is a body corporate, that some officer thereof shall state on affidavit what documents are in his or their possession or power relating to the matters in dispute, or what he knows as to the custody of them, and whether, and if so, on what grounds, the production of such documents as are in his or their possession or power is objected [* 354] to, *and thereupon the court or judge may make such further order as shall be just.

The above enactments being directed to the compelling of inspection of documents upon the grounds which would move a court of equity to order it, we may add that the right of a plaintiff in equity is limited, first, to a discovery confined to questions in the cause, *i.e.* of such material documents as relate to the proof of his (the plaintiff's) case on the trial, and does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case. The party applying, therefore, to a court of law for an order to inspect, who is in the same situation as a plaintiff in equity, must show, first, what is the nature of the suit, and the question to be tried in it; and it seems also that he should depose, in his affidavit, to his having just ground to maintain or defend it: secondly, the affidavit ought to state, with sufficient distinctness, the reason of the application, and the nature of the documents, so that it may appear that

(*b*) The applicant must show by his affidavit that his adversary has some one document in his possession to the production of which he is entitled. *Evans v. Louis*, L. R. 1 C. P. 656.

an inspection of the documents is asked for the purpose of enabling the applicant to support his own case, not to find a flaw in that of his opponent; and so that the opponent may admit or deny the possession of them. To this affidavit the opponent may answer, by swearing that he has no such documents, or that they relate exclusively to his own case, or that he is, for some sufficient reason, privileged from producing them; or he may submit to show parts, covering the remainder, on affidavit that the part concealed does not in any way relate to the plaintiff's case (c).

As ancillary to the procedure by action must be mentioned the statutory provisions concerning interrogatories (d). A litigant party may now be entitled, by order of the court or a judge, to deliver to the opposite party or his attorney *(provided such party, if not a body corporate, would be [* 355] liable to be called and examined as a witness upon such matter), interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or, in the case of a body corporate, any of the officers of such body corporate, within ten days to answer the questions put by affidavit, to be sworn and filed in the ordinary way (e). The application for leave to deliver interrogatories is usually disposed of on summons before a judge at chambers, who, on production of the proposed interrogatories when the summons is heard, determines in the first instance whether they are such as ought to be allowed or not.

The courts have a general discretion as to the allowance of interrogatories, though they will be guided in exercising it by the principles on which discovery is allowed in equity. Much doubt has however existed as to whether interrogatories can be put the answers to which might tend to criminate the party interrogated. The only intelligible rule upon the subject deducible from the cases seems to be, that when the interrogatories are *bona fide* framed for the purpose of discovery, and are relevant to the matter in issue, they may be allowed, although the answers to them may, if answered in one way, tend to criminate the party answering, leaving to such party the option of refusing to answer upon that ground. But where such interrogatories are sought to be put, the court or the judge at chambers will require a stronger case to be made out for allowing them than is ordinarily requisite, and such interrogatories will not be allowed on the common affidavit only, but some special circumstances must be laid before the judge to induce him to order them (f).

We proceed to give some account of an ordinary trial of *a cause[* 356] on issues of fact (f). If there is an issue of law, it is set down for

The trial. argument at the request of either party, and the demurrer book containing the demurrer, the joinder in demurrer, and the pleadings to which they relate, has to be made up and delivered to the judges as prescribed by the rules of practice (g), and the case then comes on for argument in due course before the court. In the case of issues of fact, the plaintiff makes up "The Issue," as it is termed, in the form (h) given by the practice

(c) *Hunt v. Hewitt*, 7 Exch. 244.

(d) C. L. Proc. Act, 1854, ss. 51-53.

(e) S. 52 states the nature of the affidavit to be made by and on behalf of the party proposing to interrogate in support of his application for leave to do so.

(f) Day, C. L. Proc. Acts, 3rd ed., pp. 257,

259, 260; *Villeboisnet v. Tobin*, 38 L. J. C. P. 150.

(g) As to trial by the record, the student is referred to Chitt. Pr., 11th ed. i. p. 924 *et seq.*; *ante*, p. 322 (f).

(g) See Practice Rules, Hil. T. 1853, *reg.* 16, 17.

(h) See sched. to Practice Rules, 1.

rules, which states the issuing and date of the writ of summons, and contains a copy of all the pleadings, with their dates, concluding thus: "Therefore let a jury come." If there are issues of law as well as of fact, they also are copied into the "Issue" as well as the other pleadings, as the jury may have to assess damages upon them. We are supposing, however, the ordinary case of issues in fact proceeding to trial before a jury. The plaintiff, when he makes up the issue, delivers it to the opposite party, and usually at the same time, if he has not already done so, gives notice of trial; the practice relating to which is regulated by the Common Law Procedure Act, 1852 (*i*), and the Practice Rules of Hilary Term, 1853 (*j*). Under ordinary circumstances ten days' notice of trial must be given. Sometimes, however, a defendant is under terms to take short notice of trial, that is, a four days' notice, where he has obtained by judge's order further time to plead, or some other advantage on those terms (*k*).

[* 357] *The Nisi Prius Record is a transcript of all the pleadings, in fact a copy of the "Issue," made on parchment (*l*), for the purposes of the trial, and delivered to the proper officer of the court in which the cause is to be tried.

When the trial is impending, the parties prepare and arrange their proofs, oral and documentary, which, as the law of evidence is extensive and difficult, often need anxious consideration. The ordinary process by which the attendance of a witness is secured is called a writ of *subpœna*; or, when the witness has documents that he is required to bring with him, a *subpœna duces tecum*. Sometimes the examination of a witness in a certain emergency, for example illness, or his having to leave the country, or being resident abroad, is taken before the trial under the provisions of statutes directed to that object (*m*), and these depositions are read at the trial should he be unable to attend. Notice to admit and produce documents is also usually given, according as they may be in the possession of the respective parties. Where a document is in the possession of the party seeking to put it in evidence, he usually gives his adversary notice in a certain prescribed form to admit it (*n*): this is done to save costs, if the document be admitted, or to throw the costs of proof on his adversary, in case of his refusing or neglecting to admit it. Should a document which the party seeks to put in evidence be in the possession of his adversary, the party needing it must give his adversary notice to produce it, in order to let in secondary evidence of its contents at the trial, if he then refuses to produce it. Our law most properly requires the document itself to be produced, unless there are sufficient grounds for receiving evidence of its contents

[* 358] *aliunde*,—as, for instance, refusal by one of * the parties, in whose possession it is, to produce the document after notice to produce it.

We may add that the parties to an action, except for breach of promise of

(*i*) *Es.* 97—99.

(*j*) *Reg.* 34—43.

(*k*) C. L. Proc. Act, 1853, s. 101, contains a provision whereby if plaintiff neglects for a certain time after issue joined to bring the issue to be tried, the defendant may give twenty days' notice to the plaintiff, as prescribed in that section, to proceed to trial, and on plaintiff's default may suggest on the record that the plaintiff has failed to proceed

to trial although duly required to do so, and may sign judgment for the costs.

(*l*) See C. L. Proc. Act, 1852, ss. 102, 103; and as to annexing particulars of demand and set-off, see Practice Rules, Hil. T. 1853, *reg.* 19.

(*m*) See, *ex. gr.*, stats. 1 Will. 4, c. 22; 6 & 7 Vict. c. 82; 23 Vict. c. 20.

(*n*) See, as to Notices to Admit, C. L. P. Act, 1852, s. 117; Pract. R. Hil. T. 1853, *reg.* 29, 30, 31.

marriage, or for a penalty or forfeiture under any law relating to the customs or land revenue, are competent and in most cases compellable to give evidence in the cause (o).

Supposing the *nisi prius* record to have been delivered and the cause entered, it will be called on for trial according to the position which it may occupy in the list; and the associate or officer of the court who performs that duty will proceed to empanel the jury from the jurors in attendance. It may be premised that a copy of the jury panel signed by the sheriff is annexed to the *nisi prius* record at the assizes. The jury process was greatly simplified by the provisions of the Common Law Procedure Act, 1852. In ancient times, when an issue of fact was raised between the parties to an action at law, the trial took place in term time at the bar of the court itself. It was also required that the issue should be tried by a jury of the county in which the cause of action arose, and the writs went to the sheriff to bring the jurors from thence to Westminster. The stat. 13 Edw. 1, c. 30 gave justices of the assize who tried real actions in the various counties power to hear and determine other issues besides those in real actions, and the writs then ran to the sheriff to have the jurors at Westminster, *nisi prius*, "unless before" that time the justices of assize came to the place where the cause was intended to be tried at a certain time, and as this was practically always the case, it was for such time and place that the jury were in fact summoned, and then and there the cause was tried. Hence arose the term "*nisi prius*" as applied to the ordinary mode of trying causes as distinguished from trials at bar; other statutes followed relating to this process, and until the * passing of the Common Law Pro- [* 359] cedure Act, 1852, various writs to the sheriff, containing more or less reference to the ancient practice, were in use; but by that Act these writs, viz., of *venire facias juratores*, *distringas juratores*, and *habeas corpora juratorum*, and the entry *jurata ponitur in respectu* were rendered no longer necessary (p), and the jury are now summoned for the trial of issues at the assizes by the sheriff pursuant to a precept from the judges of assize, and for the trial of causes in London and Middlesex pursuant to a precept under the hand of a judge of any superior court. The Act also contains provisions by which either plaintiff or defendant may apply to obtain a special jury—that is, a jury drawn from a higher class than an ordinary or common jury.

The cause being called on, the jurors, twelve in number, are sworn (q); and it is at this particular juncture that either party may exercise a right of challenge, which is of two kinds—a challenge to the array or to the poll. The former occurs when exception is taken to the principle on or means by which the jury has been procured, as where the sheriff has not chosen the jurors impartially; challenge to the poll occurs where exception is taken to individual jurors, which may be on either of the four following grounds: 1. *propter honoris respectum*, as if a lord of parliament be empanelled; 2. *propter defectum*, as if any of the jurors be an alien or an infant, or have not the qualifying estate; 3. *propter affectum* or partiality; and 4. *propter delictum*, on account of crime. The qualifications of jurors, and the exemptions from serving in that capacity (r), are mainly regulated by 6 Geo. 4, c. 50. Men

(o) 6 & 7 Vict. c. 85; 14 & 15 Vict. c. 99;

(q) Or affirm, 30 & 31 Vict. c. 35, s. 8.

16 & 17 Vict. c. 83; 17 & 18 Vict. c. 122.

(r) See Chitty's Arch. Pr. 12th ed. pp. 430,

(p) See, as to jury process, C. L. Proc. Act, et seq. 1852, ss. 104—115.

between the ages of twenty-one and sixty years who have 10*l.* a-year clear arising out of certain real property, or 20*l.* a-year arising out of certain leasehold property within the county, or who are householders rated to the poor [* 360] * rate or inhabited house duty in Middlesex on a value of not less than 30*l.*, or in any other county on a value of not less than 20*l.*, or who occupy a house containing not less than fifteen windows, are qualified and liable to serve. In London a juror must be a householder, or the occupier of a shop, warehouse, counting-house, chambers, or office for the purpose of trade or commerce within the said city, and have lands, tenements, or personal estate of the value of 100*l.* The persons exempted from serving are principally as follows: peers, judges, clergymen, Roman Catholic priests, and dissenting ministers, serjeants and barristers at law, doctors and advocates of the civil law, attorneys, solicitors, proctors; members of the College of Physicians, or College of Surgeons in London, Edinburgh, or Dublin; certificated apothecaries, officers in the navy or army on full pay, licensed pilots, household servants of her majesty, officers of customs and excise; sheriff's officers, high constables, and parish clerks.

Persons described in the jury list as esquires, or of higher degree, or as bankers or merchants, are qualified and liable to serve on special juries, subject, of course, to the exemptions from serving which are of general application.

The jury having been sworn, the junior counsel for the plaintiff states shortly the nature of the pleadings, and the issues of fact which the jury are to try. This is termed "opening the pleadings." After this, the leading counsel for that party to the cause who has the right to begin states with more or less of detail the circumstances out of which the claim arises, or on which the defence rests. The right to begin, involving as it does in most cases the right to reply, is regarded as a valuable privilege, and is frequently in cases where it is at all doubtful made the subject of a contest at the outset of a trial, in which case the presiding judge has to determine the question before the trial can proceed. The party on whom the burthen of proof rests is in general entitled to begin, and usually the burthen of proof in the first instance [* 361] is on him * who affirms, and not on him who denies. One method of determining the right to begin is by ascertaining against whom the verdict would be entered if no evidence were offered on either side: the party against whom the verdict would in such case be entered would be entitled to begin. It may be, however, that, though the affirmative of the issue or issues joined in the cause lies on the defendant, yet the plaintiff is entitled to begin, *ex. gr.*, where the plaintiff claims unliquidated or unascertained damages, he is the party to begin. Again, where there is no plea in denial of any part of the declaration, but the damages are left at large, and it is for the plaintiff in the opening of his case to show what they are, he is to begin. Thus, in an action against an employer for the wrongful dismissal of the plaintiff from his service, where the defendant does not deny either the employment or the dismissal, but pleads only a justification of the dismissal on the ground of the misconduct of the plaintiff, the affirmative of the issue joined on such plea lies on the defendant; nevertheless he has not in such case the right to begin, because the plaintiff must in the first instance give evidence of the damage which he has sustained.

With regard to the speeches of counsel, each side is allowed to address the

jury, setting forth the nature of the claim or defence, and after the evidence in support of the claim or defence is concluded, to make another speech summing up the evidence given (*r*). If the defendant call witnesses, the plaintiff does not sum up his own evidence at the end of his (the plaintiff's) case in the first instance, but after the defendant's evidence has been given and summed up, the plaintiff discusses the case and evidence in what is called the speech in reply.

The evidence and the speeches of counsel for the plaintiff and defendant being concluded, the judge sums up the evidence on both sides, commenting upon it as he *proceeds, and directs the jury as to what are the disputed facts they have to determine, giving them at the same time [* 362] such directions as may be needed concerning the law. Thus, in an action against an infant within the age of twenty-one years for goods sold and delivered in which issue has been joined as to whether the goods supplied were necessities, the judge would state to the jury the legal meaning of the word "necessaries," and having thus defined the law, leave them to determine whether the particular goods were necessities or not (*s*). Again, in an action for the price of goods sold or for money lent, the defence might be founded on the Statute of Limitations (21 Jac. 1, c. 16), and issue having been joined on such plea, the plaintiff might rely on an acknowledgment in writing under Lord Tenterden's Act (9 Geo. 4, c. 14) to take the case out of the statute. Assuming that the original cause of action did not accrue within the six years limited by the statute of James I., and the written document to have been proved, it would be for the judge to direct the jury as matter of law that it was or was not a sufficient acknowledgment to take the case out of the statute (*t*).

Not only has the judge to determine the right to begin, if disputed, but from first to last during the progress of a cause his is the controlling power which guides the legal conduct of the case, and directs it to its proper conclusion (*u*). Who has the right to begin; on whom the burthen of proof rests; what is material in the issues to be tried; what of the evidence tendered is admissible, and what is not; and all directions and definitions of the law necessary to enable the jury to deal with the issues, or to properly estimate the damages; in short, all questions of law as *distinguished from [* 363] questions of fact are for the judge. It is true, also, that long experience and a matured judgment will often enable him to point out to the jury, greatly to their advantage, the bearing and weight of different parts of the evidence on matters purely of fact, and even to present his own view of the general result of the evidence on the merits of the case, but this is never done without his at the same time explaining to the jury that the questions of fact are entirely for their determination, the judge's views being given only in aid of their discharge of that duty.

After the summing up of the judge, the jury give the verdict, which is usually a general verdict, for the plaintiff or defendant, upon the several issues.

(*r*) C. L. Proc. Act, 1854, s. 18.

(*s*) *Ryder v. Wombwell*, L. R. 4 Ex. 82, cited *ante*, p. 852.

(*t*) Generally, as to the sufficiency of an acknowledgment of a debt to bar the Statute of Limitations, see *Tanner v. Smart*, 6 B. &

C. 603; and cases collected in Darby and Bos. Stats. Lim., pp. 47, *et seq.*

(*u*) The judge has also ample power to amend defects, C. L. Proc. Act, 1852, s. 223; 1854, s. 96; 1860, s. 36.

Sometimes, however, the verdict is a special one, finding certain facts, so that the court *in banco* may afterwards determine the legal effect of such finding. Further, it sometimes happens that the trial comes to a close without the verdict of a jury being given. The defendant's counsel may submit to the judge that there is no question for the jury, that the plaintiff has not made out a *prima facie* case. If the judge is of that opinion, he intimates that the plaintiff should be non-suited, that is, be adjudged to have abandoned his action. The effect of a nonsuit is to put an end to the particular action and to cast upon the plaintiff the defendant's costs as well as his own, but it leaves him at liberty to bring a fresh action for the same cause on a future occasion, should he be so advised. Now as abandonment is a voluntary act, a plaintiff cannot be nonsuited against his will, but inasmuch as, if he persist in having the case brought to the jury, under the direction of the judge, the verdict will most likely be against him, and would for ever exclude him, supposing the judge's direction to be right, from bringing another action for the same cause, he in general assents, in the case put, to be nonsuited. If the judge insists on nonsuiting a plaintiff against his will, or misdirects the jury, should [* 364] the case be left to them, his *ruling is open to be reviewed, and a new trial may be had. It does doubtless occasionally happen that a cause being called on, and the jury sworn, the plaintiff is nonsuited because he fails to appear, and thus, in fact, abandons his case. Frequently, also, after the cause has been entered, and the trial is about to take place, and even after the cause is called on, but before the jury is sworn, if the plaintiff, finding that, through the absence of witnesses or for other reasons, he is not ready to proceed, withdraws the record; the consequence of which is, that he has to pay the defendant's costs of the day, but may re-enter the cause for trial. Other instances may be put of the trial coming to a close without a verdict on the merits. A juror may be withdrawn by consent; this substantially puts an end to the action, because the court would interpose to stay proceedings where, after such a step taken by consent of both parties, either side attempted to bring it on again. Or the judge may discharge the jury from giving a verdict where he finds there is no probability that they will agree. This leaves the case open to be brought on again for trial before another jury. Or the cause may be referred to arbitration; in such case a formal verdict for the plaintiff is usually taken by consent, subject to the reference, the arbitrator having power given him to direct that a verdict shall be entered for the plaintiff or the defendant, or a nonsuit be entered, as he shall think proper. There is a common form for an order of reference at *nisi prius*, containing many stipulations which have been found to be useful, and which are usually adopted by the parties. Sometimes the order of reference is by consent extended beyond the determination of the cause itself, to all matters in difference between the parties.

Where, however, the cause is tried out, and the verdict given in the usual way, the litigation does not always end thereby. In very many cases questions arise at *Nisi Prius* which call for consideration by the courts at Westminster, *after the trial is over, before final judgment either on one side or the other can be obtained. If, for example, there are grounds for contending that the judge at *Nisi Prius* has mistaken the principle of law applicable to the case in submitting the facts to

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the jury, or has erroneously admitted or neglected evidence given or proffered by either of the parties, his ruling may be reviewed, either on a motion for a new trial, which is made in the court in which the action was brought, or by a bill of exceptions tendered at the trial by the party dissatisfied with the ruling. By the latter course the case is at once taken to the court of error. The statute 13 Ed. 1, c. 31, first enabled the parties to take the opinion of a court of error on the ruling of a judge at *Nisi Prius*, and provided that the party dissatisfied with his ruling might tender to the judge a bill of exceptions, setting forth the exceptions taken, to which the judge is bound to affix his seal. The bill of exceptions is then annexed to, and becomes part of, the record. The court of error gives judgment upon the whole record, affirming or reversing the ruling of the judge; and if the ruling be reversed a trial *de novo* is awarded, and the case is again tried. Error in law properly so called lies for errors apparent on the record, and those only, and it was not till recently that means were provided, in addition to the power of tendering a bill of exceptions, and taking the ruling of the judge directly and at once to the court of error, of appealing to the court of error against the decision of the court in which the action was brought, on an application for a new trial, or for leave to enter a verdict or a nonsuit on a point reserved. This power was given by the Common Law Procedure Acts, and now in any case of a rule to enter a verdict or nonsuit upon a point reserved at the trial, if the rule (*v*) to show cause be refused, or * granted and then discharged, or made [* 366] absolute, the party decided against may appeal (*x*). And in any case of a motion for a new trial upon the ground that the judge has not ruled according to law, if the rule to show cause be refused, or, if granted, be then discharged or made absolute, the party decided against may appeal, provided any one of the judges dissent from the rule being refused, or, when granted, being discharged or made absolute, as the case may be; or, provided the court in its discretion think fit that an appeal should be allowed; provided, however, further, that where the application for a new trial is upon matter of discretion only, as on the ground that the verdict was against the weight of evidence or otherwise, no such appeal shall be allowed. The court of error, the exchequer chamber, and the house of lords, are courts of appeal for the purposes of the act.

An instance may be given in which leave might be moved for to enter a verdict or a nonsuit on a point reserved. Suppose it to be clearly established on the facts proved during the progress of a trial, that the liability or non-liability of the defendant depends on the construction and legal effect of a written instrument proved to have been executed by him; the fact of the execution would be matter for the jury, its construction and legal effect for the judge. In such case the course might be for the judge to give his opinion on the point, and the verdict would be entered accordingly for the plaintiff or defendant, leave being given to the party against whom the verdict was entered, to move the court in which the action is brought to enter the verdict for him.

Other grounds of moving for a new trial besides that of a misdirection of the judge, or the improper admission or rejection of evidence,

(v) A rule to show cause is commonly termed a rule nisi, because it becomes absolute, "*nisi*" "unless" cause is shown. On cause being shown, the court either discharge the rule or make it absolute, as they may think fit.
 (x) See Com. Law Proc. Act, 1852, ss. 34—43, and s. 102.

are these:—that the verdict is against the weight of evidence, that the damages are excessive, misconduct of the jury, and that the plaintiff or defendant [*367] * has been taken by surprise. A new trial is not granted on the ground that the verdict is against the weight of evidence where the amount of damages or matter in dispute is less than 20*l.*, and there is no right in question beyond the right to recover damages. Neither is it granted unless it appear that the jury have come to a wrong conclusion on the facts before them. There must be at least a strong preponderance of the evidence against their finding to induce the court to interfere, it being the province of the jury, not of the court, to appreciate the evidence given at the trial. These observations as to a verdict against evidence will apply to the motion for a new trial on the ground that the damages are excessive (y), the amount of damages to which the party is entitled being peculiarly within the province of a jury. Should the court think that the damages are somewhat excessive, it may intimate that the rule will be made absolute unless the plaintiff submits to accept a reduction then suggested, and such an intimation is usually acted on to save further litigation and expense. As an instance of misconduct of a jury affording ground for a new trial, may be mentioned the case of their drawing lots for the determination of their verdict. A new trial on the ground of surprise is only granted under very special circumstances, as where the party applying for it has, through some fraudulent trick on the part of his adversary, or in some other way, without fault of his own, been wholly surprised by the evidence given, and had no opportunity of meeting it at the trial.

The usual time (z) at which execution may issue where the verdict is not disturbed and judgment follows thereon, is fourteen days from the verdict, unless the judge who tries the cause, or some other judge or the court, orders [*368] execution to issue at an earlier or later period, with or * without terms. Before, however, giving an account of execution, some other proceedings besides those already noticed, that may intervene before final judgment is obtained, may properly be mentioned.

First, then, as to entering judgment *non obstante veredicto*, and motion in arrest of judgment. Where the defendant has succeeded at the trial, and obtained a verdict in his favour, on a plea which confesses the cause of action, but does not show any sufficient answer to it, the court will give judgment for the plaintiff "*non obstante veredicto*," "notwithstanding the verdict." So when on the face of the record it appears that the plaintiff has no right to recover, judgment may be arrested on motion made by the defendant for that purpose; but these applications after trial are at the present day comparatively unusual. It seldom now happens that substantial defects on the face of the pleadings are passed over without demurrer, it being open to the parties to plead and demur at the same time. Moreover, on motion in arrest of judgment, or for judgment *non obstante veredicto*, by reason of the non-averment of some alleged material fact or facts of material allegation or other cause, the party whose pleading is alleged or adjudged to be therein defective may, by leave of the court, suggest the existence of the omitted fact or facts, or other matter which, if true, would remedy the alleged defects: and such suggestion may be pleaded to by the opposite party within eight days

(y) A new trial may also be granted on an application on this ground is of rare account of the smallness of damages; but occurrence.

(z) Com. Law Proc. Act, 1852, s. 120.

after notice thereof, or such further time as the court or a judge may allow, proceedings for trial of any issues joined upon such pleadings being the same as in ordinary actions (*a*), and judgment follows the result of the suggestion. There is this further check also against a party lying by for the purpose of taking advantage after verdict of defects in the pleadings: that the costs of abortive issues, upon which his adversary has succeeded at the trial, are thrown upon him, it being expressly * provided (*b*) that upon an [* 369] arrest of judgment, or judgment *non obstante veredicto*, the court shall adjudge to the party against whom such judgment is given the costs occasioned by the trial of any issues of fact arising out of the pleadings for defect of which such judgment is given, and upon which such party shall have succeeded.

With regard to time, a motion for a new trial, or to enter a verdict or nonsuit, motion in arrest of judgment, or for judgment *non obstante veredicto*, cannot be made after the expiration of four days from the day of trial, nor in any case after the expiration of the term, if the cause were tried in term, nor after the expiration of the first four days of the ensuing term if the cause were tried out of term, unless entered in a list of postponed motions by leave of the court (*c*).

Error lies, after final judgment has been obtained, to reverse a judgment on the ground of some defect in the proceeding, which renders it erroneous. There is error in fact and error in law, the former relating only to the case where some fact not appearing on the record invalidates the judgment on grounds of a technical character, as for instance, that the defendant, being an infant, appeared by attorney. The grounds, however, on which error in fact may be brought are few and of rare occurrence. Error in law is where, on the face of the record, it appears that the judgment was given on insufficient grounds, as that the declaration is insufficient in law to maintain the action, and that judgment ought to have been given for the defendant instead of the plaintiff. Error in law may, and not unfrequently does, follow upon demurrer. A pleading having been demurred to, and issue of law joined, and judgment given, the unsuccessful party seeking to reverse the judgment of the court proceeds in error with that object. Error lies on the judgment on a special verdict, * and it also may be brought on a judgment upon a special [* 370] case (*d*) in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary; and the court of error may either affirm the judgment, or give the same judgment as ought to have been given by the court below, the said court of error being required to draw any inference of fact from the facts stated in such special case, which the court where the question was originally decided ought to have drawn (*e*). No judgment can be reversed in error unless error be commenced within six years after such judgment was signed or entered of record, except where the person entitled to bring error is at the time such title accrues within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, in either of such cases

(*a*) Com. Law Proc. Act, 1853, ss. 143, 144.

(*b*) Com. Law Proc. Act, 1853, s. 145.

(*c*) Rules, Hil. T. 1858, *reg.* 50.

(*d*) Com. Law Proc. Act, 1854, s. 32.

(*e*) Com. Law Proc. Act, 1854, s. 32. It had already been provided by the Com. Law Proc.

Act, 1853, s. 157, that courts of error should, in all cases, have power to give such judgment and award such process as the court from which error is brought, ought to have done without regard to the party alleging error.

extended time being given for action in the superior courts. The writ of error is no longer necessary or used for bringing error; the proceeding to error is a step in the cause (*f*).

Error in fact has to be substantiated by affidavit, and is brought in the court where the judgment is given. Error in law is matter for argument before the court of error. Upon a suggestion (*g*) of error in law alleged and denied, the cause is set down for argument, and the judgment roll is without any writ or return brought by the master into the court of error in the exchequer chamber, before the justices, or the justices and barons, as the case may be, of the other two superior courts of common law, on the day of its sitting, at such [*371] time as the judges * appoint (*h*), and, when judgment has been there given, the proceedings in error may be carried from the exchequer chamber to the high court of Parliament, and the court of error then hears and determines the case. The proceedings in error are regulated by provisions (*i*) of the Common Law Procedure Act, 1852, and the practice rules of Hil. Term, 1853.

Where some ground of defence against proceeding on the judgment has arisen after judgment, this may be made the subject of a writ of *audita querela*, by which a defendant seeks relief from the court by not having the judgment enforced against him. No writ of *audita querela*, however, can be issued without leave of the court or a judge (*k*), and the use of this writ has in modern times been in a great measure superseded by application on motion to the court, on which, on sufficient grounds, summary relief is granted. Equitable defences arising after lapse of the period during which they could be pleaded may be set up by way of *audita querela* (*l*).

Final judgment in the action having been signed, execution may issue. The ordinary writs of execution, by which the recovery of money (*m*) is enforced on a judgment, are those of *fiery facias*, *elegit*, and *capias ad satisfaciendum*; they issue out of the court in which the record is, and are directed to the sheriff of the county in which the execution is to be had (*n*). The writ of *fiery facias* (*o*) commands the sheriff that he cause to be made out of the goods and chattels of the judgment debtor in his bailiwick the amount of such judgment, together with interest thereon at the rate of 4l. per cent. from the [*372] day on which * judgment was entered up. Not only what are ordinarily termed goods and chattels may, with the exception of wearing apparel, be taken under this writ, but leases and terms of years, also money (*p*), bank-notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the person against whose effects it has been sued out; growing crops (*q*) may also in certain cases, and with some qualification, be taken under it. The time within which writs of execution ordinarily (*r*) bind the goods is from the time of their delivery to the

(*f*) Com. Law Proc. Act, 1852, ss. 146—148.

(*g*) See s. 149 of Com. Law Proc. Act, 1852, and schedule (A.) thereto, Nos. 10, *et seq.*

(*h*) Com. Law Proc. Act, 1852, s. 155.

(*i*) See ss. 146—167; and Practice Rules, Hil. T. 1853, *reg.* 64—69; Com. Law Proc. Act, 1854, s. 96.

(*k*) Rules, Hil. T. 1853, *reg.* 79.

(*l*) Com. Law Proc. Act, 1854, s. 84.

(*m*) As to the writ of execution in ejectment, *ante*, p. 279.

(*n*) See Com. Law Proc. Act, 1852, s. 121.

(*o*) See forms of proceedings, schedule to *Reg. Gen. Hil. T. 1853*, pt. ii.

(*p*) 1 & 2 Vict. c. 112, s. 12; and see also *ib.* as to charging stock in the funds or shares in companies, by order of a judge, though they cannot be taken in execution under the writ. (*q*) 56 Geo. 3, c. 50, and 14 & 15 Vict. c. 25, s. 2.

(*r*) See 20 Car. 2, c. 3, s. 16.

sheriff to be executed, but persons acquiring title to goods *bond fide*, and for a valuable consideration, before the actual seizure under the writ, and without notice of the writ, are protected against the execution (*s*).

The proceeding on interpleader may here be noticed. By it relief and protection are afforded to sheriffs and other officers when placed in a difficulty, arising out of the execution of process against goods and chattels, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons, not being the parties against whom such process was issued. Where the sheriff has acted *bond fide* and impartially in the discharge of his duties, and there is a dispute between the execution creditor on the one hand, and a stranger to the action on the other, making a claim to any goods or chattels, taken or intended to be taken in execution under any process, or to the proceeds or value thereof, they may be called upon to appear before the court or a judge, and either to maintain or relinquish their respective claims or try the same between themselves, one mode of doing which is by proceeding to trial under the order of the court on *an issue made up on the ques- [*373] tion of property, for determining to whom the goods belong. Or the parties to an interpleader may by consent have the merits of their claims disposed of in a summary manner by the court or a judge, or that may be done even without consent, at the request of either party, wherever from the smallness of the amount in dispute or the value of the goods seized it appears to the court or a judge right to order so. The issue was formerly termed a "feigned issue," because it used to state that a wager had been laid between the two parties respectively maintaining the affirmative and negative of the proposition in dispute, but the act to amend the law concerning games and wagers, introduced a simple form of issue stating merely that one party affirmed and the other denied the fact to be put in issue (*t*). It was probably deemed inconsistent that a form founded on a supposed wager should be used to raise the issue, when by that statute no action at law could have been maintained on such a wager had it been a real instead of a fictitious transaction. Nevertheless, the use of the old form, though by practice supplanted by the new one, is not positively interdicted by the statute just referred to.

It may further be mentioned that relief by way of interpleader could formerly only be obtained by a suit in equity, and it was the act 1 & 2 Will. 4, c. 58, commonly called the Interpleader Act, that first enabled courts of law to give relief against adverse claims made upon persons having no interest in the subject of such claims. It extends not only as we have mentioned to the relief of sheriffs and other officers, but to persons generally, when sued at law for the recovery of money or goods wherein they have no interest (*u*).

The writ of *elegit* (*v*) is so called because the person *suing out the [*374] execution is said to have chosen or elected to have that remedy instead of the proceeding by *fiery facias*. By the writ of *elegit* the sheriff is commanded that he cause to be delivered to the judgment creditor by a reasonable price and extent the goods and chattels of the judgment debtor (except his oxen and beasts of the plough), and also such lands, tenements, rectories, tithes, rents,

(*s*) 19 & 20 Vict. c. 97, s. 1.

(*t*) 8 & 9 Vict. c. 109, s. 19.

(*u*) See the provisions of that statute; 1 & 2 Vict. c. 45; Com. Law Proc. Act, 1860, s. 12.

(*v*) See stat. 18 Edw. 1, c. 18, and the sched. of forms, *Reg. Gen. Hil. T. 1853*, Pt. ii. Nos. 9—18.

and hereditaments, including lands or hereditaments of copyhold or customary tenure, as the said judgment debtor or any person in trust for him was seised or possessed of on the day on which judgment (*x*) was entered up, or at any time afterwards, or over which he on that day had any disposing power which he might (without the assent of any other person) exercise for his own benefit to hold the said goods and chattels, also to hold the said lands, tenements, rents, tithes, rectories, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the amount due under the execution be levied. The sheriff's duty under this writ is to impanel a jury to inquire of the goods and chattels of the debtor, and to appraise them, and also to inquire as to his lands and their value, and the goods (if any) are to be delivered to the execution creditor; and if the value of the goods is insufficient to satisfy the execution, the legal possession or right of entry to the lands is delivered to the execution creditor.

The writ of *capias ad satisfaciendum* commands the sheriff to take the body of the judgment debtor, and him safely keep, so that he may have his body to satisfy the judgment creditor the amount of the judgment with interest * at 4l. per cent. from the day on which judgment was entered up. [* 375] The defendant cannot be taken on a *ca. sa.* in an action for the recovery of a debt wherein the sum recovered does not exceed 20l., exclusive of the costs of such judgment.

We may here notice that by the Common Law Procedure Act, 1854 (*y*), a new process of execution was given, in addition to the above, in actions in the superior courts, by the attachment of debts due to the judgment debtor. A judge may now make an order that debts owing or accruing from a third person to the judgment debtor shall be attached to answer the judgment debt. The third person, or garnishee (*z*), as he is termed, has full opportunity given him under the provisions of the act for showing cause against an order on him to pay such debt to the judgment creditor, and his liability, if disputed, is tried in a suit instituted by the judgment creditor against such garnishee, as prescribed by the act.

During the lives of the parties to a judgment, execution may issue at any time within six years from the recovery of the judgment, without a revival of the judgment. After that period, or after a change by death or otherwise of the parties entitled or liable to execution, before execution can issue upon it, it must be revived by writ or with leave of the court or a judge by suggestion (*a*).

Such is the ordinary course of an action at law as remodelled by the Procedure Acts and by the Rules of Pleading and Practice founded there upon (*b*). (584)

(*x*) As to registration of writs of execution to affect lands in the hands of purchasers and mortgagees, see 23 & 24 Vict. c. 88, and also 27 & 28 Vict. c. 112, s. 1, which enacts that no judgment to be entered up after the passing of that act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of

a writ of *elegit*, or other lawful authority in pursuance of such judgment.

(*y*) Ss. 60, 67.

(*z*) From the French word "*garnir*," to warn.

(*a*) Com. Law Proc. Act, 1852, ss. 128—134.

(*b*) In connection with the foregoing account of modern procedure, and by way of contrast

(584) The subject of trials in general, and more particularly "trial by jury," has been exhaustively discussed in 3 Wait's Pr. 1 *et seq.*, to which reference is made for a full knowledge of the various steps in the conduct of a trial under the New York Code. The course of proceeding there delineated will be found not to materially differ from that prescribed by the reformed codes and rules of practice of many of the other States.

with it, some notice is here appended of the ancient trial by wager of battle, which was abolished by stat. 59 Geo. 8, c. 46. This method of deciding a civil controversy seems to have owed its origin to the military spirit of our ancestors, joined to a superstitious frame of mind: it being in the nature of an appeal to Providence, under an apprehension and hope (however presumptuous and unwarrantable) that heaven would give the victory to him who had the right. The decision of suits by this appeal to the God of battles is by some said to have been invented by the Burgundi, one of the northern or German clans who planted themselves in Gaul. Yet it does not seem to have been merely a local custom of this or that particular tribe, but to have been the common usage of all those warlike races from the earliest times (Seld. of Duels, c. 5). It may also be inferred, from a passage in Velleius Paterculus (lib. 2, c. 118), that the Germans, when first they became known to the Romans, were wont to decide contests of right by the sword: for when Quintilius Varus endeavoured to introduce among them the Roman laws and method of trial, it was looked upon (says the historian) as a "*novitas incognita disciplina, ut solita armis decerni jure terminarentur*."

This trial was introduced into England among other Norman customs by William the Conqueror; but was only used in three cases, one military, one criminal, and the third civil. The first in the courtmartial, or court of chivalry and honour (Co. Litt. 261); the second in appeals of felony (as to which *vide post*, vol. iv.); and the third, upon issue joined in a writ of right, the last and most solemn decision of real property (*ante*, p. 271). One pretext for allowing it, upon these final writs of right, was for the sake of such claimants as might have the true right, but yet by the death of witnesses, or other defect of evidence, be unable to prove it to a jury.

The last trial by battle waged in the court of common pleas at Westminster (though there was afterwards (Rushw. Coll. vol. ii. pt. 2, fol. 112; 19 Raym. 822) one in the court of chivalry in 1681, and another in the county palatine of Durham (Cro. Car. 512) in 1686) was in the thirteenth year of queen Elizabeth, A. D. 1571, as reported by sir James Dyer (Dyer, 301): and was held in Tothill Fields, Westminster, "*non sine magna juris-consultorum perturbatione*," says sir Henry Spelman (Gloss. 102), who was himself a witness of the ceremony. The form, as appears from the authors before cited, was as follows:—

When the tenant in a writ of right pleaded the general issue, *viz.*, that he had more right to hold, than the demandant had to recover; and offered to prove it by the body of his champion, which tender was accepted by the demandant; the tenant in the first place produced his champion, who, by throwing down his glove as a gage or pledge, thus waged or stipulated battle with the champion of the demandant; who, by taking up the gage or glove, stipulated on his part to accept the challenge. The reason why it was waged by

champions, and not by the parties themselves, in civil actions, was because, if any party to the suit died, the suit must have abated, and therefore no judgment could have been given for the lands in question, if either of the parties were slain in battle (Co. Litt. 294; Diversité des Courts, 304): and also that no person might claim an exemption from this trial, as was *allowed in criminal cases, where the battle was waged in [*377] person (*post*, vol. iv.).

A piece of ground was then in due time set out, of sixty feet square, enclosed with lists, and on one side a court was erected for the judges of the court of common pleas, who attended there in their scarlet robes; and also a bar was prepared for the learned sergeants at law. When the court sat, which was properly by sunrise, proclamation was made for the parties and their champions, who were introduced by two knights, and were dressed, each in a coat of armour, with red sandals, barelegged from the knee downwards, bareheaded, and with bare arms to the elbows. The weapons allowed them were only batons, or staves of an ell long, and a four-cornered leather target; so that death very seldom occurred in this civil combat. When the champions, thus armed with batons, had arrived within the lists or place of combat, the champion of the tenant took his adversary by the hand, and made oath that the tenements in dispute were not the right of the demandant; and the champion of the demandant, then taking the other by the hand, swore in the same manner that they were: each champion thus professing himself to be thoroughly persuaded of the truth of the cause he fought for. Next, an oath against sorcery and enchantment had to be taken by both the champions, in this or a similar form: "Hear this, ye justices, that I have this day neither eat, drank, nor have upon me, neither bone, stone, nor grass; nor any enchantment, sorcery, or witchcraft, whereby the law of God may be shamed, or the law of the devil exalted. So help me God and his saints."

The battle was then begun, and the combatants were bound to fight till the stars appeared in the evening; and, if the champion of the tenant could defend himself till the stars appeared, the tenant prevailed in his cause; for it was sufficient for him to maintain his ground, and make it a drawn battle, he being already in possession. But if the victory declared itself for either party, for him was judgment finally given. This victory might have arisen from the death of either of the champions, which, however, rarely happened; the whole ceremony, to say the truth, bearing a near resemblance to certain rural athletic diversions, which were probably derived from this original. Or victory was obtained, if either champion proved recreant, that is, yielded, and pronounced the horrible word "*craven*," a word of disgrace and obloquy, rather than of any determinate meaning. But a horrible word it indeed was to the vanquished champion: since, as a punishment to him for forfeiting the land of his

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*CHAPTER XIII.

INJURIES PROCEEDING FROM, OR AFFECTING THE CROWN.

HAVING in preceding chapters considered the injuries, or private wrongs, that may be offered by one subject to another, and how they may be remedied, we proceed to inquire as to the mode of redressing those injuries to which the crown itself is a party: such injuries are either where the crown is the aggressor, or else is the sufferer; and these are usually remedied by peculiar forms of process, appropriated to the royal prerogative. We will here consider the manner: I. Of redressing those wrongs or injuries which a subject may suffer from the crown; and, II. Of redressing those which the crown may receive from a subject.

I. That "the king can do no wrong," is a necessary and fundamental principle of the English constitution: meaning only, as was formerly observed (*a*), that in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the sovereign; and, secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice (*b*). Whenever therefore it happens, that, through misinformation, or inadvertence, the crown has been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign (*c*), yet the law has furnished the subject with a decent and respectful mode of removing that invasion, by informing him of the true state of the matter in dispute; which will then be put in a regular train for adjudication and adjustment.

The distance between the crown and the subject is such, that a personal injury can seldom proceed immediately and directly from the sovereign to any private man; and, as it can so seldom happen, the law in decency supposes that it never will or can happen at all; because it feels itself incapable of furnishing any adequate remedy for such wrong, without infringing the dignity and destroying the sovereignty of the royal person, by setting up some superior power with authority to call him to account. The inconvenience therefore of a mischief that is barely possible, is (as Mr. Locke has observed (*d*)) well

principal by pronouncing that shameful word, he was condemned, as a recreant, *amittere liberam legem*, that is, to become infamous, and not be accounted *liber et legalis homo*; being supposed by the event to be proved foresworn, and therefore never to be put upon a jury, or admitted as a witness in any cause.

Such was the form of a trial by battle; a trial which the tenant, or defendant in a writ of right, had it in his election to demand; and which was the only decision of such writ of right after the Conquest, till Henry II. by consent of parliament introduced the grand assize, a peculiar species of

trial by jury, in concurrence therewith; giving the tenant his choice of either the one or the other. The establishment of this alternative, Glanvil (lib. ii. c. 7), chief justice to Henry II., considered as a most noble improvement of the law.

When compared with a method of decision so barbarous as that above described, the eulogies often and lavishly passed on our trial by jury would scarcely seem to be overstrained.

(*a*) Vol. i. p. 292.

(*b*) Plowd. 437.

(*c*) Jenkins. 73; Finch, L. 88.

(*d*) On Gov. pt. 2, s. 205.

recompensed by the peace of the public and security of the government, in the person of the chief magistrate being set out of the reach of coercion.

And upon this principle, the sovereign cannot be made answerable for the misconduct or negligence of his servants (e). Injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; and for them the law in matters of right entertains no respect or delicacy, but furnishes various methods of detecting the errors or misconduct of those agents by whom the sovereign has been deceived, and induced to do a temporary injustice (f).

The common law methods of obtaining possession or restitution from the crown, of either real or personal property, are, 1. By *petition de droit*, or petition of right: which is said to owe its origin to king Edward I. (g). 2. By *monstrans de droit*, manifestation or plea of right. The former is of use where the sovereign is in full *possession of any hereditaments or chattels, and the petitioner [*381] suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself; in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate (h): and then, upon this answer being indorsed or underwritten by the sovereign, *soit droit fait al partie* (let right be done to the party), a commission will issue to inquire of the truth of this suggestion (i): after the return of which, the attorney-general may plead in bar; and the merits will be determined upon issue or demurrer, as in suits between subject and subject. Thus, if a disseisor of lands, which are holden of the crown, dies seised without any heir, whereby the crown is *prima facie* entitled to the lands, and gets possession of them; now the disseisee may have remedy by petition of right, suggesting the title of the crown, and his own superior right (k). But where the right of the party, as well as the right of the crown, appears upon record, there the party shall have *monstrans de droit*, which is putting in a claim of right grounded on facts already acknowledged and established, and praying the judgment of the court, whether upon those facts the crown or the subject has the right. As if, in the case before supposed, the whole special matter is found by an inquest of office (as well the disseisin, as the dying without any heir), the party grieved shall have *monstrans de droit* at the common law (l).

The remedy by *monstrans* was much enlarged and rendered almost universal by several statutes, particularly 36 Edw. 3, c. 17, and 2 & 3 Edw. 6, c. 8 (m), which also allowed inquisitions of office to be traversed or denied, wherever the right of a subject was concerned, except in a very few cases (n). This proceeding is, in general, had *in the petty-bag office in the court of [*382] chancery: and, if upon it the right claimed be finally determined against the crown, the judgment is, *quod manus domini regis amoveantur* (o), and by such judgment the crown is immediately out of possession (p).

(e) *Vic. Canterbury v. Att.-Gen.*, 1 Phill. 306; Broom, Const. Law, pp. 243, 723, and cases there cited.

(f) Broom, Const. Law, *ubi sup.*

(g) Bro. Abr. tit. *Prerog.* 2; Fitz. Abr. tit. *Error*, 8.

(h) Finch, L. 256.

(i) Skin. 608; Rast. Entr. 461.

(k) Bro. Abr. tit. *Petition*, 20; 4 Rep. 58.

(l) *The Saddlers' Case*, 4 Rep. 55.

(m) In part repealed by 26 & 27 Vict. c. 125.

(n) Skin. 608.

(o) 2 Inst. 695; Rast. Ent. 463; Finch, L.

460.

(p) Finch, L. 459.

As to the remedy by *monstrans de droit*, see Lord Somers's celebrated argument in *The Bankers' Case*, 14 St. Tr. 77.

Although it is still competent to a subject seeking redress as against the crown to proceed according to the course above indicated (*g*), he will probably be advised rather to avail himself of the simpler and more effective process provided by the recent statute 23 & 24 Vict. c. 34, relating to petitions of right, and re-modelling the practice therewith connected. A petition of right, addressed to the sovereign, may now, if the suppliant think fit, be entitled in any superior court of common law or equity in which the subject-matter of such petition, or any material part thereof, would have been cognizable if the same had been a matter in dispute between subject and subject, and, if entitled in a court of common law, the petition must state in the margin a venue (*r*) showing where the trial thereon is to be. The petition must set forth with convenient certainty the facts entitling the suppliant to relief, and must be signed by the suppliant, his counsel, or attorney (*s*). It is to be left with the home secretary, in order that the same may be submitted to the queen for consideration, and that her fiat that right be done may, if she think fit, be granted thereupon (*t*).

A copy of the petition and fiat (when obtained) are to be left at the office of the solicitor to the treasury, indorsed as required by the act, and praying for a plea or answer on behalf of the crown within twenty-eight days. The petition will then be transmitted to the particular * department to which the subject-matter thereof may relate, and will be prosecuted in the court in which it is entitled, or in such other court as the lord-chancellor may direct (*u*).

The time for answering, pleading, or demurring to the petition, on behalf of the crown, is the said period of twenty-eight days after the same has been left at the office of the solicitor to the treasury, or such further time as may be allowed (*x*).

If the petition of right be presented for the recovery of real or personal property, or any right in or to the same, which has been granted away or disposed of by the crown, a copy of such petition, allowance, and fiat, as aforesaid, must be served upon, or left at the place of abode of, the person in the possession, occupation, or enjoyment of such property or right, indorsed with a notice requiring him to appear thereto within eight days, and to plead or answer thereto in the court in which the same is prosecuted within fourteen days after service: and the party thus served must, within the time so limited, if he intend to contest the petition, enter an appearance to the same, and plead, answer, or demur thereto within the time specified in such notice, or such further time as may be allowed (*y*).

The petition may, under the provisions of the recent act, be answered by way of answer, plea, or demurrer in a court of equity, or in a court of common law by way of plea or demurrer, or by both pleas and demurrer, by or in the name of the attorney-general on behalf of the crown, and by or on behalf of any other person who may be called upon to plead or answer thereto, in the same manner as if such petition in a court of equity were a bill filed therein, or, if the petition be prosecuted in a court of common law, as if the same

(*g*) 23 & 24 Vict. c. 34, s. 18.

(*r*) Which venue may afterwards, however, be changed; s. 4.

(*s*) S. 1.

(*t*) S. 2. See *Irwin v. Grey*, 3 F. & F. 635; L. R. 1 C. P. 171; L. R. 2 H. L. 20.

(*u*) S. 3.

(*x*) S. 4.

(*y*) S. 5.

were a declaration in a personal action, and such matter as would be sufficient ground of answer or defence in point of law or fact to such petition on the behalf of the crown may be alleged * on behalf of any person called [* 384] on to plead or answer thereto (z).

The practice and course of procedure in a suit in equity or personal action between subject and subject, so far as applicable, shall be observed in prosecuting a petition of right under the act (a). And the judgment for the suppliant now is, that he is entitled to such relief, and upon such terms and conditions (if any), as the court shall think just (b).

Judgment having been given for the suppliant, any judge of the court in which the petition was prosecuted will, upon application on behalf of the suppliant, after the lapse of fourteen days from the making, giving, or affirming of such judgment, certify to the commissioners of the treasury, or to the treasurer of her majesty's household, as the case may require, the tenor and purport of the same, in the form given by the act (c), and thereupon the commissioners of the treasury will pay the amount of monies and costs, due under the judgment to the suppliant, out of any funds in their hands for the time being legally applicable thereto, or which may be afterwards voted by parliament for that purpose, provided such petition relate to any public matter. But in case the petition relate to any private property of or enjoyed by her majesty, or any contract or engagement made by or on behalf of her majesty, or any matter affecting the queen in her private capacity, a certificate as aforesaid must be sent to the treasurer of the queen's household, and the amount to which the suppliant is entitled will be paid him out of such funds or monies as her majesty may direct to be applied for that purpose (d). (585)

II. Injuries to the crown. II. The methods of redressing such injuries as the crown may receive from the subject are,

1. By certain common law actions, such as *quare * impedit* (e) or trespass (f), the bringing and maintaining of which have been [* 385]

How remedied. deemed to be not inconsistent with the dignity of the crown. It would, however, be alike tedious and difficult to run through every minute distinction that might be gleaned from our ancient books with regard to this matter; nor is it in any degree necessary to do so, as much easier and more effectual remedies are usually afforded by certain prerogative modes of process, which are peculiarly confined to the sovereign.

2. By inquisition or inquest of office: which is an inquiry made by the queen's officer, her sheriff, coroner, or escheator, *virtute officii*, or by writ to him sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the queen to the possession of lands or tenements, goods or chattels (g). This is done by a jury of no determinate number; being either twelve, or less, or more; who, *ex. gr.*,

- (e) S. 6.
- (a) S. 7.
- (b) Ss. 9, 10.
- (c) S. 18.
- (d) S. 14.

- (e) F. N. B. 32.
- (f) Bro. Abr. tit. *Prerogatives*, 130; F. N. B. 90; Year Book, 4 Hen. 4, 4.
- (g) Finch, L. 323, 4, 5.

(585) See *ante*, note 79. See, also, *U. S. v. McLemore*, 4 How. (U. S.) 286; *Hill v. U. S.*, 9 Id. 336.

inquire whether the tenant for life of the crown died seised, whereby the reversion accrues to the crown: whether A., who held immediately of the crown, died without heirs; in which case the lands belong to the sovereign by escheat: whether B. be attainted of treason; whereby his estate is forfeited to the crown: or whether C., who has purchased lands, be an alien; which may be another cause of forfeiture. These inquests of office were more frequent during the continuance of military tenures amongst us than they are at present; for then, upon the death of any of the king's tenants, an inquest of office was held, called an *inquisitio post mortem*, to inquire of what lands he died seised, who was his heir, and of what age, in order to entitle the sovereign to his marriage, wardship, relief, *primer-seisin*; or other advantages, as the circumstances of the case might turn out. To superintend and regulate these inquiries the court of wards and liveries was instituted by statute 32 Hen. 8, [* 386] * c. 46, which was abolished at the restoration of king Charles II., together with the oppressive tenures upon which it was founded.

With regard to other matters, the inquests of office still remain in force, and are taken upon proper occasions; not only in regard to lands, but also to goods and chattels personal, as in the case of wreck, when appertaining to the crown, treasure-trove, and the like; and to forfeitures for offences. For every jury which tries a man for treason or felony, every coroner's inquest that sits upon a *felo de se*, or one killed by chance-medley, is not only with regard to chattels, but also as to real interests, thus far an inquest of office, that if they find the treason or felony, the crown is thereupon, by virtue of this office found, entitled to its forfeitures (*h*).

These inquests of office were anciently devised by law, as an authentic means to give the king his right by solemn matter of record; without which he in general could neither take nor part from anything (*i*); it being essential for the liberties of England, and greatly for the safety of the subject, that the crown may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury (*k*). It was however particularly enacted by the statute 33 Hen. 8, c. 20, that, in case of attainder for high treason, the king should have the forfeiture instantly, without any inquisition of office. And, as the crown has (in general) no title at all to any property of this sort before office found, therefore the statute 18 Hen. 6, c. 6, had provided that all letters patent or grants of lands and tenements before office found, or returned into the exchequer, should be void. And, by the Bill of Rights at the Revolution, 1 Will. & M. st. 2, c. 2, it is declared that all grants and promises of [* 387] fines and forfeitures of particular persons before conviction (which * is here the inquest of office) are illegal and void; as indeed was the law of the land in the reign of Edward III. (*l*).

With regard to real property, if an office be found for the king, it puts him in immediate possession, without the trouble of a formal entry, provided a subject in the like case would have had a right to enter; and the king shall receive all the mesne or intermediate profits from the time that his title accrued (*m*). As on the other hand, by the *articuli super cartas* (*n*), if the king's escheator or sheriff seize lands into the king's hand without cause,

(*h*) *Post*, vol. iv.

(*i*) Finch, L. 82.

(*k*) Gilb. Hist. Exch. 133; Hob. 347.

(*l*) 2 Inst. 48.

(*m*) Finch, L. 325, 326.

(*n*) 28 Edw. 1, stat. 3, c. 19.

upon taking them out of the king's hand again, the party shall have the mesne profits restored to him.

In order to avoid the possession of the crown, acquired by the finding of such office, the subject may not only have his petition of right, which discloses new facts not found by the office, and his *monstrans de droit*, which ^{May be traversed.} relies on the facts as found: but also he may (for the most part) traverse or deny the matter of fact itself, and put it in a course of trial: yet still, in some special cases, he has no remedy left but a mere petition of right (o). These traverses, as well as the *monstrans de droit*, were greatly enlarged and regulated for the benefit of the subject, by the statutes before mentioned, and others (p). And in the traverses thus given by statute, which came in the place of the old petition of right, the party traversing is considered as the plaintiff (q); and must therefore make out his own title, as well as impeach that of the crown, and then shall have judgment *quod manus domini regis amoveantur, &c.*

3. Where the crown has unadvisedly granted anything by letters patent, which ought not to have been granted, or where the patentee has done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent * is by writ of *scire facias* in chancery, as we [* 388] have before stated (r).

4. An information on behalf of the crown, filed in the exchequer by the attorney-general, is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for a personal wrong committed in the lands or to other possessions of the crown (s).

It differs from an information filed in the court of queen's bench, of which we shall treat in the next Volume, for this is instituted to redress a private wrong, by which the property of the crown is affected; that is calculated to punish some public wrong committed by the defendant. An information in the exchequer is grounded on no writ under seal, but merely on the intimation of the attorney-general, who "gives the court to understand and be informed of" the matter in question; upon which the party is put to answer, and trial is had, as in a suit between subject and subject. The most usual informations are those for intrusion and for debt: intrusion, for any trespass committed on the lands of the crown, as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, or the like; and debt, upon any contract for money due to the crown, or for a forfeiture so due upon the breach of a penal statute. The procedure by information is used to recover a forfeiture, occasioned by transgressing a law enacted for the establishment and support of the revenue: enactments which regard mere matters of police and public convenience, being usually left to be enforced by common informers, in *qui tam* actions. There is also an information *in rem*, when goods are supposed to have become the property of the crown, and no man appears to claim them, and to dispute its title, as anciently in the cases of treasure-trove, wrecks, waifs, and estrays, seized by the king's officer for his use. Upon such seizure an information was usually filed in the *exchequer, and thereupon a proclamation was made for the owner [* 389] (if any) to come in and claim the effects; and at the same time there

(o) Finch, L. 324.

(p) See stat. 34 Edw. 3, c. 13; 36 Edw. 3, c. 13; 2 & 3 Edw. 6, c. 8.

(q) Law of Nisi Prius, 211, 212.

(r) *Ante*, pp. 32, 33.

(s) Moor, 375.

issued a commission of appraisement to value the goods in the officer's hands; after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the use of the crown (*t*). And when, in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by act of parliament for transgressions against the laws of the customs and excise, similar process was adopted in order to secure such forfeited goods for the public use, though the offender himself had escaped the reach of justice.

5. The ancient writ of *quo warranto* was in the nature of a writ of right for the crown, against him who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim, in order to determine the right (*u*). It lay also in case of non-user or long neglect of a franchise, or mis-user or abuse of it; being a writ which commanded the defendant to show by what warrant he exercised such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. This writ was originally returnable before the king's justices at Westminster (*x*); but afterwards only before the justices in eyre, by virtue of the statutes of *quo warranto*, 6 Edw. 1, c. 1, and 18 Edw. 1, st. 2 (*y*); but when those justices had given place to the king's temporary commissioners of assize, the judges on the several circuits, this statutory provision lost its effect (*z*); and writs of *quo warranto* (if brought at all) had to be prosecuted and determined before the king's justices at Westminster. In case of judgment for the defendant, he had an allowance of his franchise; but in case of judgment for the crown, for that the party was entitled to no such franchise, [* 390] * or had disused or abused it, the franchise was either seized into the king's hands, to be granted out again to whomsoever he should please; or, if it were not such a franchise as might subsist in the hands of the crown, there was merely judgment of ouster, to turn out the party who had usurped it (*a*).

The judgment on a writ of *quo warranto* (being in the nature of a writ of right) was final and conclusive even against the crown (*b*). Which, together with the length of its process, probably occasioned that disuse into which it fell, and introduced the more modern method of prosecution, by information filed in the court of queen's bench by the attorney-general, in the nature of a writ of *quo warranto*; wherein the process is speedier, and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for usurpation of the franchise, as to oust him, or seize it for the crown; but it has long been applied to the mere purpose of trying the civil right, seizing the franchise or ousting the wrongful possessor; the fine being nominal only.

During the violent proceedings that took place towards the end of the reign of King Charles II., it was among other things thought expedient to remodel most of the corporate towns in the kingdom; for which purpose many of those bodies were persuaded to surrender their charters, and informations in the nature of *quo warranto* were brought against others, upon a supposed, or frequently a real, forfeiture of their franchises by neglect or abuse of them. And the consequence was, that the liberties of most of them were seized into

(*t*) Gilb. Hist. of Exch. c. 18.

(*u*) Finch, L. 822; 2 Inst. 282.

(*x*) Old Nat. Brev. fol. 107, ed. 1584.

(*y*) 2 Inst. 498; Rast. Entr. 540.

(*z*) 2 Inst. 498.

(*a*) Cro Jac. 259; 1 Show. 280.

(*b*) 1 Sid. 86; 2 Show. 47; 12 Mod. 225.

the hands of the king, who granted them fresh charters with such alterations as were thought expedient; and during the state of anarchy thus caused, the crown assumed to name their magistrates. This exertion of power, though perhaps *in summo jure* it * was for the most part strictly legal, gave [* 391] a great and just alarm; the new-modelling of many corporations being a very great stride towards the establishing of arbitrary power; and therefore it was thought necessary at the revolution to bridle this branch of the prerogative, at least so far as regarded the metropolis, by statute 2 Will. & M. c. 8, which enacts, that the franchises of the city of London shall never afterwards be seized or forejudged for any forfeiture or misdemeanor whatsoever.

This proceeding by information in the nature of a *quo warranto* is now principally applied to the decision of corporation disputes between party and party, without any intervention of the prerogative, in the manner which has already been explained (c).

6. The prerogative writ of *mandamus* must, in conclusion, be specified as a remedial process analogous to those remedies which have been latterly under our notice. This writ issues from the court of queen's bench, is directed to a person, corporation, or court, and in the sovereign's name commands such person, body corporate, or tribunal, to do a certain specified act, as matter of duty, agreeably to right and justice (d). The writ is meant to be remedial where there would otherwise be a defect of justice, and is not available in lieu merely of the remedy by action (e). We have before considered under what circumstances and how it may be made available against a corporation, and in the last chapter of this Volume we shall briefly notice cases in which it will be granted for the purpose of compelling an inferior court to do justice. (586)

Now applied to
the decision of
corporation
disputes.

6. Mandamus.

* CHAPTER XIV.

[* 392]

THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

THIS court, which was constituted by the stat. 20 & 21 Vict. c. 95, was by that act made a court of record, and given exclusive jurisdiction in all causes, suits, and matters matrimonial in England, except in respect of marriage licences. It holds its sittings at Westminster, and numbers amongst its judges, in addition to the judge of the court of probate (a) sitting as judge ordinary, the lord chancellor and all the judges of the courts of queen's bench, common pleas, and exchequer.

As the court now under our notice is of recent origin, and as the relief granted by it was never previously granted by any tribunal in the kingdom, it may not be improper to recur shortly to the state of the law as it here existed before its constitution.

(c) Vol. i. chap. 17.

(d) Selw. Nisi Prius, 18th ed. ii. 1016.

(e) *Id.* p. 1028.

(a) *Post*, chap. 15.

(586) As to the writ of *scire facias*, see 5 Wait's Pr. 633; *quo warranto*, *id.* 613; *mandamus*, *id.* 548.

In the very early ages of this country, a polygamy of a very curious description appears to have existed. A colony of some ten or twelve men took each of them a woman, and these men and women lived together in common. The children born of this promiscuous connection were common to the whole company, and were supported by the common lot. On the introduction of Christianity, the fathers of the church naturally turned their attention to this promiscuous state of life, and promulgated certain rules setting forth the degrees of affinity within which it was forbidden for persons to marry. These rules, [* 393] in themselves salutary and just, were * afterwards extended to an exaggerated degree in a manner to which I shall shortly advert. And so much so, that as early as the reign of Edward the Confessor, considerable complaints appear to have been made of the clergy, who introduced certain restrictions of marriage which for social causes it was found necessary to discourage (b).

Thus matters continued, the clergy, and then the ecclesiastical courts, arrogating to themselves the decision of all matters relating to marriage, and proceeding, on the ground that marriage was a sacrament ordained by the Saviour, to argue that being a sacrament it must be held to be indissoluble. And, indeed, the indissolubility of the marriage contract was upheld by the law of England from the earliest time of which we have record. But, inasmuch as it could not be contended that the commission of adultery, in itself the most flagrant and incontestable breach of the marriage vow, was compatible with the cohabitation of man and wife, it was found necessary to adopt some means to punish the offender, and to relieve the innocent party from the ties and obligations of a contract, already rendered unilateral by the transgression of the other. And the courts accordingly were in the habit of decreeing a separation on the ground of adultery, such separation giving to each party the rights of celibacy, excepting that of contracting a new marriage. But adultery was found to be not the only cause which rendered cohabitation impracticable—cruelty, and some other causes soon appeared to the courts to be just and proper reasons for allowing the separation of man and wife. And such relief was accordingly granted, upon the principle that it would be alike cruel and unjust to compel by force the maintenance of a contract, entered into perhaps with mutual affection and desire, but now virtually rescinded by mutual hatred and disgust.

[* 394] But men having gained this right of separation, and * partial rescission of their marriage contract, began to look forward to these separations with a view to effecting other and more cherished ties. And to meet this growing desire on the part of the population, the ecclesiastical law extended to an extreme limit those degrees of consanguinity and affinity within which it was declared unlawful that matrimony should be contracted. And not only was it held that relations of the blood to the sixth or seventh degree were incapable of contracting matrimony, but that if either party to the marriage had been pre-contracted to another, the marriage was voidable; and eventually it was declared that if it happened to any man to have carnal connection with a woman, the same relations in regard to affinity were thereby created between them as if an actual marriage had taken place. Upon these

(b) Lappenberg's History of the Anglo-Saxon Kings, vol. ii. p. 339 (translated by Thorpe).

grounds of pre-contract, affinity and carnal knowledge, the ecclesiastical law, still upholding the doctrine of the sacramental indissolubility of marriage, extended matrimonial disability far beyond the law of God, and declaring such marriages to have been null and void *ab initio*, separated the parties "*pro salute animarum*," lest they should endanger their souls by living in a state of known sin. A state of things which rendered the position of society most insecure, few men being able clearly to know whether a marriage which had brought wealth, happiness, and children might not in a moment be set aside for a cause unknown to either party at the time of the contract.

Thus matters continued till the time of the Reformation, when the view of the reformers, including Cranmer, was, that a more extended system of divorce should be allowed; and that a second marriage should be permitted after a divorce for adultery. Proceeding upon this view, an act was passed 3 & 4 Edward 6, c. 11 (A.D. 1549), enabling the king to appoint sixteen ecclesiastics, and the same number of laymen, to order and to compile such laws ecclesiastical, as should be thought convenient. Such * commission was [* 395] accordingly appointed to consider and report upon the subject; and a report was drawn up and published under the title *Reformatio Legum Ecclesiasticarum*. But the king dying before it could be submitted to his approval, this digest, though in itself a most authoritative and valuable work, never received the sanction and imprimatur of the law. It was, however, one of the doctrines of the Reformation, that marriage, though in itself a holy and desirable state, was not to be considered as a sacrament; and it was then for a short time held by the ecclesiastical tribunals, that inasmuch as marriage had ceased to be regarded as a sacrament, and as the indissolubility of marriage was a character that it received as a sacrament, marriage being now simply a civil contract, entered into with the incident of a religious ceremony, it no longer retained the element of indissolubility. And accordingly one or two persons, as we read, were divorced *à vinculo matrimonii*, by sentence of an ecclesiastical court. The question, however, of the power of such courts to dissolve marriage was soon settled by the case of Sir J. Foljambe (c), which came before the star chamber, in the 44th year of queen Elizabeth, A.D. 1601, and decided that the marriage contract retained all the incidents of the sacrament, though it no longer existed as a sacrament itself.

But inasmuch as it is a fundamental doctrine of our law that no wrong exists without a remedy, and as the greatest wrong which can be inflicted upon a man by the profligacy and seduction of his wife was, in fact, unredressed by sentence of an ecclesiastical tribunal, which, though it released him from cohabitation with, and from support of his guilty wife, entailed upon him an involuntary celibacy during her natural life, it was not long before means were devised to remedy this evil. And as it was clear that no judicial authority in the realm had jurisdiction to make such a decree as would enable a man or a woman to marry again, recourse was had to the supreme power of the state—the * king, lords, and commons in Parliament assembled— [* 396] to legislate upon the particular circumstances of the case, and for an exceptional injury, to supply an exceptional remedy.

The earliest applications made to Parliament for such relief as the ordinary Courts of the realm were unable to grant, were founded on very special cir-

cumstances. Thus in the case of Mr. Lewknor (St. Tr. vol. xiii. p. 1308), a bill was obtained, not dissolving the marriage so as to enable the parties to marry again, but simply bastardizing such children as were born of the wife while she lived in open adultery; such adultery having been proved before the Ecclesiastical Court. In lord Roos's case (Macqueen's Practice of the House of Lords, p. 551), a bill was passed "to enable Lord Roos to marry again," he having been separated from his wife by reason of her adultery, and it being politically desirable to continue the succession from him. In the countess of Macclesfield's case (*id.* p. 574), the aid of the legislature was invoked in consequence of the scandalous and flagrant circumstances of the case. And in the duke of Norfolk's case, A.D. 1694, the question of indissolubility was raised again.

The cases cited and some others became precedents, and in 1701 a bill having been obtained to dissolve a marriage and enable the petitioner to marry again, applications for special legislation became more numerous. Still, however, no steps were taken to reduce the practice of Parliament to any consistency, or to regulate its procedure, and give it somewhat more the character of a judicial than of a legislative tribunal, until the year 1798, when certain resolutions were passed, known as lord Loughborough's Orders.

By these orders, no petition could be presented to the House, unless an official copy of the proceedings, and of a definitive sentence of divorce, *a mensâ et thoro*, in the ecclesiastical courts, was delivered on oath at the bar of the house at the same time. On the second [* 397] reading of * the bill, the petitioner was required to attend for the purpose of being examined, if the house should think fit, as to any collusion touching the adultery, or the bill for divorce, or touching the proceedings in the ecclesiastical court, or in any action at law; and also as to whether the wife at the time of the adultery was living with or under the protection and authority of the husband.

In 1809 a further order was made, that no divorce bill should be received without a clause prohibiting the offending parties from intermarrying. This clause, however, though thus insisted on by the lords, was always thrown out by the commons; and no instance exists of a bill containing such a provision becoming law, except in one or two cases where the marriage, if it had taken place, would have been void, by reason of the consanguinity of the parties. And in 1831, it was ordered by the house, that when a trial had been had at Nisi Prius, to which the petitioner had been a party, no bill for divorce should be read a second time till the judge before whom the trial or inquiry had taken place, had transmitted a report of such proceeding to be laid on the table of the house.

The proceedings in the ecclesiastical court were commenced by a citation, and both parties being before the court, a statement of the petitioner's case, termed an allegation, was prepared and filed in the cause. This Proceedings in the ecclesiastical court. allegation, in several paragraphs or articles, set out at length all the facts upon which the petitioner relied for his decree, and which he was in a position to support by the testimony of witnesses. A copy of this allegation was delivered to the respondent, together with the names of the witnesses to be produced, and a note of the articles on which each was to be examined. A day was then fixed for the examination of witnesses and an

examiner was appointed for the purpose. The examiner, who was for this purpose an officer of the court, having made himself acquainted with the circumstances of the case from perusal of the facts stated in the allegation, proceeded to examine *the witnesses brought before him. Such examination [* 398] being concluded on behalf of the petitioner, and the deposition of each witness having been taken in the form of a narrative, the examiner proceeded to cross-examine him on behalf of the respondent upon interrogatories supplied to him for that purpose. The evidence for the respondent was then given in the same way, upon a responsive allegation; and being taken down by the examiner, was sealed up and retained by him till an order for publication was made, when the court appointed a day for the trial, and counsel were heard, and judgment was given, subject to an ultimate appeal to the Privy Council.

A definitive sentence of divorce, *a mensâ et thoro*, being thus obtained, the petitioner proceeded to lay his case before the house of lords, in accordance with the standing orders before adverted to, and subject to his proving the case, he obtained a bill divorcing him from the bonds of matrimony, and allowing him to marry again. The provisions of the bill, which was very short, were generally these: 1. The marriage was dissolved. 2. The husband was empowered to marry again. 3. He was given the rights of a husband as to any property of an after-taken wife. 4. The divorced wife was deprived of any right she might have as his widow. 5. Her after-acquired property was secured to her as against the husband from whom she was divorced. In the case of the wife obtaining the bill, similar provisions were made in her favour.

In the place of this cumbrous and protracted machinery, there is now provided in the Court for Divorce and Matrimonial Causes a short and easy remedy, and one open to all classes, from its simplicity of character and moderation of expense.

But though the court has been thus instituted to hear and decide on such cases, nothing can deprive the legislature of its inherent power of passing bills of divorce; and since the date of the Divorce Act, 1857, two private Acts of Parliament to divorce *a vinculo* have been granted, *under peculiar circumstances, to gentlemen who petitioned the house for that purpose (e). [* 399]

The relief granted by the Court for Divorce and Matrimonial Causes is of several distinctive characters. It decrees a restitution of conjugal rights in cases of desertion; it grants a judicial separation in cases of adultery, cruelty, or desertion for two years and upwards; a dissolution of the marriage in cases of adultery at the prayer of the husband, and in cases of adultery aggravated with certain other offences at the suit of the wife; and it declares a nullity of the marriage in cases where the marriage appears to be invalid, either by reason of some informality in the celebration, or of some incapacity, either legal or physical, in one or other of the contracting parties; it also has a power which seems, however, to have fallen into disuse, of pronouncing a decree in a suit of jactitation of marriage, declaring there to be no marriage, and admonishing the defendant to cease from boasting of the alleged marriage; and it has a power, shared by certain inferior tribunals, of

The Court
for Divorce.

(e) In the cases of Mr. Sandwith and of Mr. Dickinson; 23 & 28 Vict. Private Acts, not printed.

granting an order protecting a wife's earnings from her husband and his creditors in cases where the wife has been deserted. It has also jurisdiction by virtue of the stat. 21 & 22 Vict. c. 93, called the Legitimacy Declaration Act, 1858, to entertain suits enabling persons being natural born subjects of the queen, or whose right to be deemed natural born subjects depends wholly or in part on their legitimacy or on the validity of a marriage, and being domiciled in England or Ireland, or claiming any real or personal estate in England, to establish their legitimacy and the validity of the marriage of their parents and of their grandparents and of themselves, and to make decrees binding on the crown and all other persons to such effect, and further that the applicant has a right to be deemed a natural born subject of the queen.

[* 400] A restitution of conjugal rights is granted in every case * where the marriage is established, when the husband and wife are living apart, and where the defending party fails to make out such a case as would entitle him or her to a judicial separation. And with a view to avoid multiplicity of suits, it is competent, though not necessary, for such respondent, at the same time that he or she answers the petition, to pray for and obtain a judicial separation in the same suit. The decree of restitution pronounces for the marriage, admonishes the respondent to take the petitioner home and treat him or her as husband or wife, and to render him or her conjugal rights; and further to certify to the court, within a certain time, that he or she has done so; in default of which an attachment for contempt of court will be issued against the offending party.

By the 16th section of the above-mentioned act (20 & 21 Vict. c. 85), the court has power to grant a judicial separation, which is substituted for the divorce *a mens et thoro*, on the ground of adultery, cruelty, or desertion for two years and upwards; the latter being a ground of separation not previously recognised by the ecclesiastical courts.

A separation on the ground of cruelty may be granted at the petition of either husband or wife; but in order to justify such decree, there must be, in the language of an eminent judge (f), "either actual violence committed, attended with damage to life, limb, or health, or a reasonable apprehension of such violence."

Desertion, to be a ground of separation, must be a desertion without cause for two years and upwards, and be contrary to the will and without the consent of the party deserted. And it has been held, upon the construction of this section, that the right accrues to the offended party on the expiration of the two years, so that a *bond fide* offer of a return to cohabitation made after that period does not determine the desertion so as to disentitle the aggrieved party to the relief prayed (g).

[* 401] * The effect of a decree of judicial separation, when obtained, is set out in the 25th and 26th sections of the 20 and 21 Vict. c. 85, and sects. 7 and 8 of the 21 and 22 Vict. c. 108, from which it appears that from the date of the sentence and whilst the separation continues, the wife is to be considered as a feme sole with respect to property of every description which she may acquire or which may come to or devolve upon her, or to which she has or shall become entitled as executrix, administratrix,

(f) Dr. Lushington, *Lockwood v. Lockwood*, 2 Curt. 281. (g) *Cargill v. Cargill*, 27 L. J., P. & M. 69.

or trustee, since the sentence of separation, or to which she is possessed or entitled for an estate in remainder or reversion at the date of the decree; and such property may be disposed of by her in all respects as a feme sole, and on her decease the same will, in case she dies intestate, go as the same would have gone if her husband had been then dead; provided, that if she again cohabits with her husband, all such property as she may be entitled to when such cohabitation takes place will be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate. She is also, whilst so separated, considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband is not liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant; but where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same has not been duly paid by the husband, he will be liable for necessaries supplied for her use.

The only purpose for which apparently she retains her status as wife is in the exercise of any joint power given to herself and her husband, which she is not prevented, by the operation of the decree, from joining with him in giving effect to (h). •

* Such decree of separation may, however, at any time be reversed [* 402] upon the ground that it was obtained in the absence of the party affected by it, and upon its being further shown, where desertion was the ground of the decree, that there was reasonable ground for the desertion alleged. Until such reversal, however, the decree is valid and effectual for the protection of any person or corporation who shall deal with the wife; and no discharge, variation, or reversal of the decree will prejudice or affect any rights or remedies which any person would have had in case the same had not been so reversed, varied, or discharged in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the making such decree and its discharge, variation or reversal (i). And all persons and corporations who, relying on such decree, make payments to, or deal with, the wife, are protected by such order, though it be at the time actually reversed or varied, unless at the time of such payment or other dealing with the wife such persons or corporations had notice of the reversal or variation of the decree (k).

Incident to the granting of a decree of judicial separation is the power of the court to make orders for the future maintenance of the wife and for the custody and maintenance of the children. The ecclesiastical courts acting upon the principle that all property is *prima facie* vested in the husband, and that the wife is entitled to be supported according to the means of her husband during the pendency of the suit, and treating her during such suit as an innocent party, whether prosecuting or defending, allotted her alimony *pendente lite*, varying very considerably in amount according to the position of the parties and the circumstances of the case. This equitable principle has been adopted by the court for divorce, and with a view to the convenience of having the practice in these cases as far as possible settled, it is the usual, but not inflexible rule, to *allow the wife, by way of alimony *pendente lite*, one-fifth of the joint incomes of the [* 403]

(h) *Ib.* s. 26.

(i) 21 & 22 Vict. c. 106, s. 8.

(k) *Ib.* s. 10.

husband and wife. On the termination of the suit, if in favour of the wife, the practice usually is to allot her from a quarter to one-third of the joint incomes by way of permanent alimony, the husband being at liberty, in the event of his income diminishing, to move for a decrease of the allotment, and the wife, on the other hand, being at liberty, if necessary, to move for a proportionate increase.

In every case, also, in which the court makes any decree or order for alimony, it may direct the same to be paid either to the wife herself or to any trustee on her behalf, to be approved by the court, and may impose any terms or restrictions which it may deem expedient, and may from time to time appoint a new trustee, if for any reason it appears to the court expedient so to do (l).

In regard to the children of the marriage the court has vested in it by the 35th section of the 20 & 21 Vict. c. 85, a power exceeding that exercised by the courts of law or equity, for by it the court is empowered to make such interim and final orders with respect to the custody, maintenance, and education of the children of the marriage as it may deem just and proper, and may, if it thinks fit, direct proceedings to be taken for placing the children under the protection of the court of chancery. In carrying out the provisions of this section the court recognises the common law right of the father to the custody of his children, and, unless for very good reasons, does not interfere with such custody. During the pendency of the suit, both parties are usually allowed reasonable access to the children, in whose custody soever they may be; and in the result their custody, if prayed for, is usually committed to the party who is found to be innocent, with such orders for the other party to have access to them as it may consider fair to the [* 404] parents and * not prejudicial to the interests of the children themselves. In the case of a mother who is proved guilty of adultery, she is usually debarred from such access, though it has not been the practice to treat the offending father with the same rigour. And where it has appeared that the party succeeding in the suit is not the person to whom it would be for the interests of the children themselves that their custody should be entrusted, some third persons willing to undertake their care and approved of by the court have been appointed their guardians, and an allowance made to them for their support (m).

The most important function of the court is, however, in the granting of decrees of dissolution of marriage. And for this purpose any husband may present a petition to the court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery; and any wife may present a petition praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *à mensâ et thoro*, or of adultery coupled with desertion without reasonable excuse, for two years or upwards; incestuous adultery being taken to mean adultery committed by a husband with a woman with whom if his wife were dead he could

(l) 20 & 21 Vict. c. 85, s. 24.

(m) *Chetwynd v. Chetwynd*, 1 L. R. P. & M. 39.

not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity, including, therefore, adultery with the wife's sister; and bigamy being taken to mean marriage of any person, being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere (*n*).

* Upon any such petition it becomes the duty of the court, following in this respect the practice of the houses of parliament, to satisfy [* 405] itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and also to inquire into any counter-charge which may be made against the petitioner (*o*).

In case the court, on the evidence in relation to any such petition, is not satisfied that the alleged adultery has been committed, or finds that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the court is bound to dismiss the petition (*p*).

If, however, it is satisfied on the evidence that the case of the petitioner has been proved, and does not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the court is bound to pronounce a decree declaring such marriage to be dissolved. It is, however, expressly provided that the court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such * wilful neglect or mis- [* 406] conduct as has conduced to the adultery (*q*).

With regard, therefore, to the position of a husband, he is entitled to have his marriage dissolved on account of the adultery of his wife, provided his own conduct has not been such as to bring him within the prohibitory clauses of the Act.

With regard to the wife's position, it is only necessary to remark that the bigamy with adultery contemplated by the statute has been construed to mean adultery committed with the person with whom the bigamy has been committed (*r*).

It will be observed that there are two distinct classes of bars to the applicant's right to have a dissolution of marriage, of which one class are peremptory bars, binding the court to dismiss the petition, and the other addressed to the discretion of the court, to be exercised according to the circumstances of each particular case. Thus, according to the 30th section, a failure of

(*n*) 20 & 21 Vict. c. 85, s. 27.

(*o*) 20 & 21 Vict. c. 85, s. 29.

(*p*) *Ib.* s. 30.

(*q*) 20 & 21 Vict. c. 85, s. 31.

(*r*) *Horne v. Horne*, 27 L. J. P. & M. 50.

proof, the petitioner's connivance at, or condonation of, the adultery, or the presenting or prosecuting of the suit in collusion with either of the other parties to it, compel the court to dismiss the suit; while under the 31st section, the adultery of the petitioner, or his or her unreasonable delay in presenting or prosecuting the petition, or cruelty, desertion, or wilful neglect and misconduct conducing to the adultery complained of, are only so far bars to the suit that the court is not bound to pronounce a decree of dissolution if it finds any of such offences to be established. The discretion, however, which is thus vested in the court is a judicial and not an arbitrary discretion, and as such, certain rules have been laid down by the judges of the court for their guidance in the exercise of this discretion. Thus, as to the adultery of the petitioner, some special [* 407] circumstances must appear so as to bring it * within the discretionary clause, either that it was committed in ignorance of the existence of the respondent, or where the petitioner *bona fide* though wrongfully believed that his marriage had been dissolved, or where the adultery complained of had occurred many years ago, and was known to and condoned by the wife (s). As to the unreasonable delay, it must be of such a nature as to make it appear that the petitioner was insensible to the injury of which he complains (t). And misconduct conducing to the adultery must amount to a breach of some marital duty, and be of such a character that it might fairly be contemplated by the petitioner as likely to lead to the commission of adultery (u).

Before the passing of the 20 & 21 Vict. c. 85, the alleged adulterer was no party to the suit in the ecclesiastical court, nor was he represented before the parliamentary committee who took the Divorce Bill into their consideration; now, however, by the 28th section of the Act, the petitioner is bound to make the alleged adulterer a co-respondent to the petition, unless, upon special grounds to be allowed by the court, he is excused from doing so, and being thus a party to the suit, the court has the power to make such order upon him as to payment of the whole or any part of the costs of the proceedings as it may think fit (x). The court has power also, in the case of a wife's petition, to make the woman with whom the husband is alleged to have committed adultery a party to the suit, with a view no doubt under certain circumstances of condemning her in costs.

The decree in the first instance is a decree *nisi*, and not made absolute for a period of six months from the date thereof, within which time the queen's proctor, on the direction of the attorney-general, by virtue of his office, Decree absolute. Intervention. [* 408] * or any other member of the public, may intervene in the suit and show cause why the decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the court; and, on cause being so shown, the court will deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry, or otherwise as justice may require; and at any time during the progress of the cause or before the decree is made absolute any person may give information to the queen's proctor of any matter material to the due consideration of the case, who may thereupon take such steps as the attorney-general may deem necessary or

(s) *Morgan v. M. and Porter*, 1 L. R. P. & M. 644.

(t) *Pellow v. Pellow and Berkeley*, 29 L. J. P. & M. 44.

(u) *Cunnington v. Cunningham and Noble*, 28 L. J. P. & M. 101.

(x) *Id.* *supra* 51.

expedient; and if from any such information or otherwise the queen's proctor suspects that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the attorney-general, and by leave of the court, intervene in the suit, alleging such case of collusion, and retain counsel and subpoena witnesses to prove it; and the court may order the costs of such counsel and witnesses, and otherwise, arising from such intervention, to be paid by the parties or such of them as it shall see fit, including a wife, if she have separate property (*y*). The right, however, to make the parties to a suit pay costs to the crown when the petition is dismissed is confined to cases where the queen's proctor has alleged and proved a case of collusion. In all other cases where the queen's proctor intervenes, the recognised rule prevails, that the crown neither pays nor receives costs (*z*).

By the 20 & 21 Vict. c. 85, a dissolution of the marriage could only be pronounced by the full court of divorce, consisting of three judges of the court, the judge ordinary being one (*a*); now, however, the judge ordinary may * sit alone to hear and determine all matters arising in the court, [* 409] and may exercise all powers and authority whatever which might previously have been heard and determined and exercised respectively by the full court or by three or more judges of the said court, the judge ordinary being one, or where the judge ordinary deems it expedient, in relation to any matter which he might hear and determine alone by virtue of this act, he may have the assistance of one other judge of the court, and sit and act with such one other judge accordingly, and, in conjunction with such other judge, exercise all the jurisdiction, powers, and authority of the court (*b*).

The judge ordinary can thus hear petitions for dissolution or for nullity of marriage, arguments on bills of exceptions, special verdicts, and special cases. He can also try questions under the Legitimacy Declaration Act, 1858, and he may grant or refuse a rule for a new trial, such order, however, being subject to an appeal to the full court (*c*).

On a decree for a dissolution of marriage being pronounced at the suit either of the husband or the wife, the court may order the husband to secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the court of chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties; and may suspend the pronouncing of its decree until such deed shall have been duly executed (*d*); and in cases where a husband has no property on which a gross sum or an annual payment could be secured, it may make an order upon the husband for weekly or monthly * payments, with power from time to time to discharge, modify, or suspend the order as it may think fit (*e*). [* 410]

On a decree at the suit of the husband, where the wife is entitled to property either in possession or reversion, the court may order such settlement as it thinks reasonable to be made of such property, or any part thereof, for the

(*y*) 23 & 24 Vict. c. 144.

(*z*) *Lautour v. The Q. Pr.*, 33 L. J. P. & M.

89.

(*a*) Sect. 10.

(*b*) 23 & 24 Vict. c. 144, s. 1.

(*c*) *Ib.* s. 2.

(*d*) 20 & 21 Vict. c. 85, s. 82.

(*e*) 29 Vict. c. 32, s. 1.

benefit of the innocent party, and of the children of the marriage, or either or any of them, and such settlement will be valid, notwithstanding the existence of the disability of coverture at the time of its execution (*f*). The power of the court, it will however be observed, is limited to those cases in which there is issue of the marriage living at the time of the pronouncing of the decree (*g*); a limitation reasonable enough where there are children, but entirely without reason where the marriage has been fruitless, or where, having been children, they have died before the pronouncing of the decree.

Where, also, there is issue living of the marriage, the court, after a final decree of dissolution of marriage, has power, which it has not in cases of judicial separation, to inquire into the existence of antenuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and to make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as it considers just and fit (*h*). The court, in acting upon the power thus conferred upon it, looks to the interests of the children as well as to the position and the conduct of the parties; and while it lays down no inflexible rule upon the subject, it is the practice, in respect of property settled by the petitioner, to order the trustees of the settlement to deal with the portion of the trust funds so settled as if * the respondent were dead at the time of the order; and with regard to the property settled by the respondent, either to leave it to follow the trusts of the settlement, or to subject it to such payments to or for the benefit of the petitioner and the children as reason and justice may require (*i*).

There is also the same power of making orders for the custody, maintenance, and education of children as in a suit for judicial separation.

The action for criminal conversation, before alluded to (*k*), has been abolished (*l*); but a husband may, in a suit for judicial separation, or for a dissolution of his marriage, or in a suit limited to that object only, claim damages from the adulterer, and the suit, as regards him, will be tried, and the damages assessed by a jury, upon the same principles as actions for crim. con. were formerly tried. This important alteration has, however, been introduced, that whereas the damages recovered formerly went to the plaintiff, the court may now direct in what manner such damages shall be applied, and may direct the whole or any part to be settled for the benefit of the children (if any), or as a provision for the maintenance of the wife (*m*). And where the adulterer has been made a party to the suit, as for this purpose he must necessarily be, the court may order him to pay the whole or any part of the costs of the proceedings (*n*).

A decree absolute for the dissolution of the marriage having been made, either party dissatisfied with the final decision of the court may, within one calendar month after the pronouncing thereof, appeal therefrom to the house of lords, and on the hearing of any such appeal, the

(*f*) 20 & 21 Vict. c. 85, s. 45; 23 & 24 Vict. c. 44, s. 6.

(*g*) *Bacon v. Bacon and Bacon*, 2 Sw. & Tr. 86; *Corrance v. Corrance and Love*, 1 L. R. P. & M. 495.

(*h*) 22 & 23 Vict. c. 61, s. 5.

(*i*) *March v. March and Palumb*, 1 L. R. P. & M. 440.

(*k*) *Ante*, p. 397.

(*l*) 20 & 21 Vict. c. 85, s. 59.

(*m*) *Ib.* s. 53.

(*n*) *Ib.* s. 34.

house of lords may either dismiss the appeal, or reverse the decree, or remit the case to be dealt with in all respects *as the house of lords shall [*412] direct: no respondent or co-respondent, however, not appearing and defending the suit on the occasion of the decree *nisi* being made, has any right of appeal to the house of lords against the decree when made absolute, unless the court, upon application made at the time of the pronouncing of the decree absolute, sees fit to permit an appeal (o).

When the time for appealing against any decree dissolving a marriage has expired, and no appeal has been presented, or when any such appeal has been dismissed, or when in the result of any appeal any marriage shall have been declared to be dissolved, or when, as above stated, there is no right of appeal, then, immediately after the decree absolute, the respective parties may marry again, as if the prior marriage had been dissolved by death (p). A marriage, therefore, by a divorced person with his divorced wife's sister, or any other person within the prohibited degrees of affinity through the wife, would be illegal.

A sentence of nullity of marriage may be obtained either by reason of the parties being within the prohibited degrees of affinity or consanguinity, by reason of a previous existing marriage, by reason of the mental incapacity of one or both of the parties at the time of the marriage, by reason of the failure of compliance with statutable requirements, or by reason of the physical incapacity of either party to perform the duties of marriage.

By 5 & 6 Will. 4, c. 54, all marriages celebrated after the 31st day of August, 1835, between persons within the prohibited degrees of consanguinity or affinity, are absolutely null and void to all intents and purposes whatsoever. Before the passing of that act such marriages were only voidable during the lifetime of the parties.

Affinity exists between illegitimate as well as legitimate relations (q), but it is not created by the mere fact of *sexual intercourse, though for [*413] some time a contrary opinion prevailed (r).

In cases of bigamy, it is often prudent to obtain a declaration of nullity of marriage, even after there has been a conviction of bigamy against the offending party, as the person so convicted is not thereby estopped from asserting at a future time the validity of his second marriage (s), in answer to which the bigamy itself must be proved, proof of a conviction of that offence not being conclusive evidence of the fact of bigamy.

Both parties to a marriage must, at the time of its celebration, be of a mind capable of giving a binding consent thereto. The law fixes the age at which such consent may be given in males at fourteen years, and in females at twelve, considering a consent given by either party when under that age revocable by either on attaining fourteen or twelve years. In cases of persons over the respective ages of twelve or fourteen years, a marriage may be annulled by reason of the insanity or imbecility of one or both of the parties contracting (t), or on account of fraud (u), and a suit may be insti-

(o) 81 & 82 Vict. c. 77, s. 3.
(p) 20 & 21 Vict. s. 85, s. 57; 81 & 82 Vict. c. 77, s. 4.

(q) *Horner v. Horner*, 1 Hag. Con. 853.
(r) *Wing v. Taylor*, 2 Sw. & Tr. 278; S. O. 30 L. J. P. & M. 258.

(s) *Searle v. Price*, 2 Hagg. Con. 192.

(t) *Portsmouth v. Portsmouth*, 1 Hagg. Ecc. 856.

(u) *Hartford v. Morris*, 2 Hagg. Con. 436.

tuted by a sane person to set aside a marriage contracted by him during a period of insanity (*v*).

A marriage may also be set aside for non-compliance with the Marriage Acts. The stat. 4 Geo. 4, c. 76, s. 22, enacts, that if any persons shall knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by special licence, or shall knowingly and wilfully intermarry without due publication of banns or licence from a person or persons having authority to grant the same first had and obtained, or shall knowingly [* 414] and * wilfully consent to or acquiesce in the solemnisation of such marriage by any person not being in holy orders, the marriage of such persons shall be null and void to all intents and purposes whatsoever.

The 8th section of the same act declares that when the parents or guardians, or one of them, of a minor openly and publicly declare, or cause to be declared, in the church or chapel where the banns are published, at the time of such publication, his or her or their dissent to such marriage, such publication of banns shall be absolutely void.

First, then, with regard to undue publication of banns. In these cases both parties must be aware of the undue publication, or of the non-publication, of the banns at some time before the celebration of the marriage (*x*): so that when an undue publication takes place, but is known only to one of the parties until after the marriage, such undue publication does not work a nullity (*y*).

The great object in these cases is to obtain publicity, and to give to those persons interested an opportunity, if they think fit, of objecting to the marriage. And for this reason, a publication of banns in a man's name of reputation, though not of birth, may, under some circumstances, be valid (*z*). And the omission of a christian name by which the party is not generally known, [* 415] * will not always invalidate the marriage (*a*). So, also, in the case of an illegitimate person, the use of the name of the mother in addition to that of the putative father by which the party was generally known (*b*), and a publication in the name of the mother, though the party had during her life passed by several other names (*c*), has been held to be a sufficient compliance with the statute.

In a marriage by licence the identity of the parties using the licence is the important point to establish, in contradistinction to a marriage by banns, where the due publication is the material consideration (*d*).

And so much so, that when the name of one of the parties is wrongly inserted in the licence, though for the express purpose of concealment,

(*v*) *Turner v. Myers*, 1 Hagg. Con. 417.

(*x*) *Tongue v. Allen*, 1 Curt. 38; 1 M. P. C. 90; *Wright v. Elwood*, 1 Curt. 49 & 662; *Midgeley v. Wood*, 30 L. J. P. & M. 57.

(*y*) *Rez v. Monton*, 16 B. & Ad. 640. As instances of an undue publication, it may be mentioned that where the christian name of John was substituted for that of Bower (*Midgeley v. Wood*, 30 L. J. P. & M. 57): where one of the christian names commonly used by the party was omitted (*Pouget v. Tomkins*, 1 Phill. 499; 2 Con. 142; *Wiltshire v. Prince*, 3 Hagg. Ecc. 332); where the surname Widowcroft was used for that of Meadowcroft

(*Meadowcroft v. Gregory*, 2 Phill. 365); and where an illegitimate person was described by the name of her putative father, or that of her mother, and not by the name she always bore (*Wilson v. Brockley*, 1 Phill. 132; *Tooth v. Barrow*, 1 Ecc. & Ad. 371), the publication has been held to be undue.

(*z*) *Diddear v. Faucit*, 3 Phill. 580.

(*a*) *S. C.*, 3 Phill. 588; see 2 Con. 143.

(*b*) *Sullivan v. Oldacre*, 2 Con. 288; *S. C.*, 3 Phill. 45.

(*c*) *Wakefield v. Mackay*, 1 Con. 394; *S. C.*, 1 Phill. 134.

(*d*) *Erving v. Wheatley*, 2 Con. 184.

the marriage had by virtue of such licence is not invalidated (e). Neither will the fact of the licence being granted by a person not duly authorised to do so invalidate a marriage had by virtue of it, unless both parties at the time of the marriage know of the incompetency of the party so granting it (f).

When both parties consent to or acquiesce in the solemnization of matrimony by a person not in holy orders, or where a minor is married contrary to the express dissent of parent or guardian, openly and publicly declared at the time of the publication of banns in the place where such banns are published, a marriage celebrated by such person, or after such declaration of dissent, is null and void.

Save as above, the want of consent, in the case of a minor, does not affect the validity of the marriage (g).

[* 416] * The court can also, subject to an appeal to the house of lords (h), decree a nullity of marriage, by reason of the physical incapacity of either of the parties. When such incapacity is in the nature of congenital malformation, proof of such fact is sufficient without any specified period of cohabitation to found the decree. When there is no such impediment, the court requires evidence of a sufficiently long cohabitation without consummation of the marriage, to satisfy it that such non-consummation arises from some defect of a permanent and incurable nature. The ecclesiastical courts formerly required a triennial cohabitation in such cases; latterly, however, the rule has been much relaxed, the admissibility of the parties themselves as witnesses in these suits rendering such strict precaution no longer necessary.

A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country to justices in petty sessions, or in either case to the divorce court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate or justices or court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him. Such earnings and property then belong to the wife as if she were a feme sole, and if the husband or any other creditor of or person claiming under the husband seizes or continues to hold any property of the wife after notice of any such order, he is liable, at the * suit of the wife (which she is empowered [* 417] by the statute to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice. During the continuance of such order the wife is, and is deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be if she obtained a decree of judicial separation (i). And the order, in addi-

(e) *Clowes v. Clowes*, 3 Curt. 185; *Bevan v. McMahon*, 2 Sw. & Tr. 58; *S. C.*, 30 L. J. P. & M. 61.

(f) *Dormer v. Williams*, 1 Curt. 870.

(g) *Doddecar v. Faucit*, 3 Phill. 581.

(h) 20 & 21 Vict. c. 85, s. 56; 21 & 22 Vict. c. 108, s. 17.

(i) 20 & 21 Vict. c. 85, s. 21.

tion to protecting property acquired by her own lawful industry, or of which she may become possessed after the desertion, protects such also as she may become entitled to as executrix, administratrix, or trustee, after the commencement of the desertion (*k*); and also any property to which she is entitled in remainder or reversion at the date of the desertion (*l*).

Every order must state the time at which the desertion, in consequence of which the order is made, commenced; and such statement is conclusive as regards third persons dealing with the wife (*m*). All persons and corporations who, in reliance on such order, make payments to, or permit transfers or acts to be done by the wife, being protected by the order, though such order be actually discharged or reversed at the time of the payment, transfer, &c.: provided that at the time of their dealing with the wife such persons acted without notice of the reversal or discharge (*n*).

The order, if made by a police magistrate or by justices at petty sessions, must, within ten days of the making, be entered with the registrar of the county court within whose jurisdiction the wife is living (*o*). This proviso, however, is directory, and not imperative; so that the will of a married woman [* 418] who has obtained such an order * is valid, though the order may not have been registered within the time specified (*p*).

Having thus treated of the relief which the court has the power to grant, it becomes necessary to inquire shortly into its ordinary course of procedure.

Procedure. With regard to all suits and proceedings, other than proceedings for dissolving a marriage, the court is bound to act and to give relief upon the principles and rules which in its opinion are as nearly as possible conformable to the principles and rules on which the ecclesiastical courts formerly acted, and gave relief in such suits, subject, however, to certain alterations in the procedure directed by the act constituting the court, and controlled by the rules and orders made by virtue of the powers conferred on the judge ordinary.

The procedure of the court is by petition and answer, the petition setting out shortly in paragraphs the petitioner's case, and concluding with a prayer for such relief as is sought; and the answer setting out in paragraphs the answer to the charges made by the petitioner, and any counter charges which may be necessary for the respondent to make, either for the purpose of obtaining a dismissal of the petition, or for obtaining relief for injuries under which he or she is supposed to suffer. The petitioner has then the same right of pleading in reply, and the respondent of re-joining as now exists in common law pleadings. And the same right of pleading applies to a co-respondent or other person made a party to the suit. The petition and the answer, where the latter contains anything more than a traverse of the matter alleged in the petition, are supported by an affidavit of the party verifying the contents. The pleadings being concluded, the judge directs the mode in which the case is to be tried. In cases of dissolution of marriage, either of the parties may [* 419] claim to have the disputed * questions of fact tried by a jury; and for this purpose the court has a similar power of summoning juries to that possessed by the common law courts. Subject to any order which the

(*k*) 21 & 22 Vict. c. 108, s. 7.

(*l*) *Ib.* s. 8.

(*m*) *Ib.* s. 9.

(*n*) *Ib.* s. 10.

(*o*) 20 & 21 Vict. c. 85, s. 20.

(*p*) *Goods of Faraday*, 31 L. J., P. & M. 7.

judge may make, the witnesses, in all proceedings before the court where their attendance can be had, must be sworn and examined orally in open court. The court may, however, give liberty to the parties to verify their cases in whole or in part by affidavit, subject to the liability of the deponent in every such affidavit to be cross-examined by or on behalf of the opposite party orally in open court. Trials upon affidavit, however, are very rarely permitted except in case of a petition for a dissolution of marriage on the ground of bigamy, where the respondent has been already tried and convicted of the bigamy which is the foundation of the suit. And in cases where the marriage has taken place abroad, and the validity of the marriage is not one of the questions in the suit, the court usually permits such marriage, and the identity of the parties to it, to be proved by affidavit.

In proceedings other than those for a dissolution of marriage, it is lawful for the court, but not obligatory upon it, to direct the truth of any question of fact arising in the suit to be tried before itself, or before any of the judges of the court, by the verdict of a special or a common jury (*q*). The court may also direct an issue to be tried in any court of law, either before a judge of assize, or at the sittings in London or Middlesex, as is now done by the court of chancery; and the rules of evidence observed in the superior courts of common law at Westminster are applicable to and observed on the trial of all questions of fact in the court.

By Lord Brougham's Act (14 & 15 Vict. c. 99), and by the Amendment Act (16 & 17 Vict. c. 83), no party to a suit instituted in consequence of adultery, nor * the husband or wife of such party, is a competent [* 420]
Evidence. witness in the suit; thus excluding the evidence of all parties to a suit for a dissolution of marriage, or for a judicial separation where adultery is charged in the petition. But when a wife became entitled to a dissolution of her marriage on proving her husband's adultery, coupled with either his desertion or his cruelty towards her; and it was clear that the only person who could give satisfactory evidence of such cruelty and of such desertion would in most instances be the wife herself, the 22 & 23 Vict. c. 61, s. 6, made the husband and wife respectively competent and compellable to give evidence of or relating strictly to such cruelty or desertion, on any petition presented by a wife for a dissolution of her marriage by reason of her husband's adultery, coupled with cruelty or desertion. A previous modification of the above-mentioned acts was also effected by the 43rd sect. of the 20 & 21 Vict. c. 85, by which the court may, if it think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath upon the hearing of the petition. No such petitioner is, however, bound to answer any questions tending to show that he or she has been guilty of adultery.

There had, however, been for some time past a very strong feeling in the minds of many persons that any restrictions on the competency of persons to give evidence in suits affecting themselves were contrary to justice and public policy, and, accordingly, the legislature in the last session of parliament passed an act doing away with such restrictions and rendering all parties in suits instituted in consequence of adultery, and their husbands or wives, competent

(*q*) 20 & 21 Vict. c. 85, s. 36.

to give evidence in relation to such suits (r); so that, for the future, we may anticipate in every suit to be tried in the divorce court, that the [*421] *parties in a contested case will be called in support of their respective averments, and that, in their absence, the presumption which usually attaches to the absence of a party from the witness-box will apply against them.

The case having been heard from, either before the judge himself, or before the judge with a jury, as may be directed, a decree is pronounced, subject, in suits for a dissolution and for nullity of marriage, to an appeal

Appeal.

to the House of Lords, and in other cases to an appeal to the full court. A new trial or a rehearing may be moved for and granted by the judge ordinary alone, but the rule granting or refusing a new trial is subject to an appeal to the full court.

The costs of the suit are in the absolute discretion of the court, no appeal lying on the question of costs alone.

The court also grants inspection of documents, and is in the habit, in cases where it is necessary to do so, to make orders on the parties to attend either at

Practice.

the trial or before the registrar of the court, for the purpose of being identified. There is also a power to tender a bill of exceptions, and to have a special verdict returned, or a verdict subject to a special case, as in the courts of common law, to be argued before the judge ordinary. The court has also power, pursuant to the statute, to issue a commission, or to give orders for the examination of witnesses out of the jurisdiction, or unable by reason of illness or otherwise to attend at the trial.

In suits where the wife is dependent either wholly or mainly upon her husband for support, the court, following the practice adopted by the House of Lords, orders the husband to pay, or to secure to the satisfaction of the registrar of the court, such sum as he may consider necessary to enable her to prosecute or defend the suit, and at the termination of the suit makes such order as to the money so paid or secured as it may think reasonable; but, in practice, this being a matter more between the wife's solicitor and the husband [*422] than between the wife *and her husband, it is usual, in cases where no misconduct has been brought home to the wife's solicitor, to allow him, as against the husband, the costs incurred by the wife, at all events up to such sum as the court has ordered to be secured as above-mentioned. There is also a power to permit suits to be instituted and defended *in forma pauperis*, and to dispose, upon summons, of any matters of minor importance arising in the course of the suit.

**Enforcing
decrees and
orders.**

The decrees and orders of the court are enforceable in the same manner as judgments or decrees of the court of chancery, viz., by attachment, or by sequestration. (587)

(r) 33 & 33 Vict. c. 68, s. 8.

(587) Formerly the practice of granting legislative divorces in proper cases prevailed to a considerable extent in the United States; but judicial ones are more favored at present, and the former are forbidden in recent revisions of several of the State constitutions. See *Teft v. Teft*, 3 Mich. 87; *Head v. Head*, 2 Kelly (Ga.), 191; *Bryson v. Bryson*, 17 Miss. 590; *Bingham v. Miller*, 17 Ohio, 445. In some of the States, the suit for divorce is to be brought before a court of common law; in others, before a court of equity; in others, before a court which has both equity and common-law jurisdiction; and, in all, the suit is more or less

*CHAPTER XV.

[* 423]

THE COURT OF PROBATE.

By the 20 & 21 Vict. c. 77, called "The Court of Probate Act, 1857," all the jurisdiction and authority of the ecclesiastical courts, in respect of the granting and revocation of probates of wills and letters of administration in England, was taken from such courts and granted to a court holding its sittings in London, and called the court of probate. This court is presided over by a judge who ranks with the judges of the superior courts of common law, and as Judge Ordinary of the Divorce Court has precedence in his Court next after the Lord Chief Baron, and who is assisted in his duties by four registrars and a secretary, in addition to the other usual officers of a court. The court exercises jurisdiction over the granting of probates and letters of administration, and determines all questions relating to matters in testamentary cases, and its business usually consists in pronouncing upon the validity of wills and codicils, and deciding, in cases of intestacy, upon the person to whom the administration of the deceased's estate is to be committed. Formerly this function was exercised by different courts throughout the country, those of the several dioceses having power to grant probate and administration when a person died having goods within their jurisdiction. But questions of difficulty and expense frequently arose as to which of the courts had the right of making such grant and receiving the fees payable thereon, the right depending mainly upon the question of whether the deceased person had personal estate, or * what was then called *bona notabilia* [* 424] within the jurisdiction of the particular court. Now, however, such questions no longer arise, for the court at Westminster, by means of its different registries in London and throughout the country, has jurisdiction to grant probate and letters of administration in all cases where a person has died leaving personal estate in this country. By the institution of this court a state of things, also, which was anomalous and discreditable to the legal procedure of the country had been rectified, for the probate of a will, as granted by the ecclesiastical court, was only binding upon the personal estate of the testator, and was not conclusive in regard to his real estate; and this, although the testator might by such will have appointed an executor, and formally have devised his lands to the person for whose benefit he intended them. And, accordingly, it was not an uncommon occurrence for the same will disposing of the real and the personal estate of the testator, to be held a valid will when contested in the ecclesiastical courts on the question of the administration of the personalty, and to be declared an invalid will when contested in an action of ejectment brought by the heir-at-law for the recovery of the lands so devised by the testator from the person to whom he had devised them. Now, however,

modified, as to the procedure, by the peculiar nature of the subject, and by the adoption of rules of practice from the ecclesiastical courts of England. 2 Bish. Mar. & Div., § 254. Divorce is allowed for several causes, as adultery, cruelty, willful desertion for a specified period, habitual drunkenness, etc., as regulated by statute in the several States. For more specific information, the statutes of the particular State should be consulted. See Vol. 1, 358, note 148.

where proceedings are taken to dispute the validity of a will, or for the purpose of proving it in solemn form of law, where the will affects the real estate, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will, are made parties to the suit, and are bound by the decree pronounced in it.

A will may be proved by the executor, if an executor is appointed in the will, at his option, either in common form—in which case the probate may at

Proof of wills. any time afterwards be called in and disputed—or in solemn

form, when he is compelled to cite the next-of-kin, and other persons adversely affected by the will, after which it cannot at any future time [* 425] be disputed by the persons so cited, or * by persons claiming under or through them. Similarly, it may be proved by the residuary legatee, in case no executor is appointed, and if no residuary legatee is named, then by the next-of-kin or by a legatee.

Where an executor is appointed in a will, and he declines or takes no step towards proving it, he may be cited by the persons interested under the will to show cause why he should not take probate: and if, upon such citation, he either renounces probate, or does not appear, then his right in respect of his executorship entirely ceases, and the representation of the testator, or the administration of his effects, will go in such manner as if he had been appointed executor (a).

In speaking of a will, the term “will” must be taken to include one or more codicils, because a man’s will may consist not only of that portion of his testamentary papers which is commonly called *his will*, but of any number of testamentary papers, not inconsistent with each other, from the whole of which, taken together, his intentions are to be drawn; and all that is necessary to entitle papers to probate as a will, apart from the question of due execution, is that they should have been written in the lifetime of the deceased, and contain his final wishes as to the disposition of his estate after his death. But in citing an executor to take probate of a will, there being a will and one or more codicils, it is competent to a party to contest the validity of one or more of the codicils, without necessarily contesting the validity of the whole of the will. And the same rule applies to cases where no executor is appointed, but where the residuary legatee, or some other person, is applying for a grant of administration with the will annexed.

In cases of intestacy, the court has the power, formerly vested in the ecclesiastical courts, of granting administration to the widow or next-of-kin of the deceased, or to both; having in this case an absolute discretion, **Administrations.** [* 426] * which, however, is usually exercised in favour of the widow. In the case of the death of a married woman, her husband is entitled to the administration of her effects, unless she has duly made a will by virtue of a power or otherwise during the coverture, which the husband is not in a position to dispute, and provided she was not protected by an order under the Divorce Act, or by a decree for a judicial separation, or by a divorce *a mensa et thoro*; in either of which events her next-of-kin would be entitled to take out administration in preference to the husband. If the intestate leaves no wife, administration is granted to the next-of-kin, according

to their degree, or to the persons entitled in distribution, or, in default of any such person taking out administration, then to a creditor.

The business of the court is divided into the common form business and contentious business: the common form business, including the granting of probates and administrations, where there is no contention as to the right thereto or when the right having been contested has been determined, and the contentious business relating to such matters as come into litigation. The common form business, which is usually brought before the court by motion and affidavit, in relation to the granting of probates, dis-

Common form
business.

Probate.

poses of such questions as how much of a man's testamentary papers are entitled to probate,—as to whether, upon an admitted state of facts, the execution is of such a nature as to be in conformity with the requirements of the Wills Act,—as to whether obliterations, alterations, interlineations, or erasures appearing upon the face of a will are entitled to probate—in reference to contingent or conditional wills, as to whether or not the contingency or the condition referred to in the will has happened,—with a view to the proof of the contents of a lost will, whether the will was lost under such circumstances as to give rise to the presumption that it was revoked,—as to whether or not * the will of a married woman, made during coverture, [* 427] is entitled to probate,—and, of many other points too numerous to specify, upon which questions of law or practice may arise for the determination of the court. With regard, also, to the testamentary papers

Incorporation of
documents.

of the deceased, a question very often arises as to the incorporation of documents, and this happens in cases where a man in making his will refers to some other document then in existence, and directs his property to be distributed, either wholly or partially, according to the terms of that document. This mostly happens in cases where a testator refers to his marriage settlements, or to former wills, or lists of plate or valuables which he wishes to be distributed in a particular way when the instrument or document so referred to becomes part of the will; but the reference in the will to incorporate such paper with it must be clear and distinct, so as to preclude the possibility of any mistake in the identity of the paper; and the paper itself must be one already in existence, though it need not be in the possession or even under the control of the deceased.

With regard to the obliterations, alterations, interlineations, and erasures, a will may be entitled to probate with or without them, according to whether or not they existed on the will at the time of the execution; and the presumption of law, in the event of there being no evidence one way or the other, will be that the will at the time of its execution by the testator did not contain such obliterations, alterations, interlineations, or erasures.

With regard to the will of a married woman, such will may be made by virtue of a power reserved to her, or of a marriage settlement, or with her husband's assent, or it may be made by her to carry her separate estate; and the court, in determining whether or not such will is entitled to probate, will not go minutely into the question, but will only require to be satisfied that the testatrix had a power reserved to her, or was * entitled to separate estate, and will, if so satisfied, grant probate to her executor, leaving it to the court of chancery, as the court of con- [* 428]

Wills of married
women.

Obliterations, &c.

struction, to say what portion of her estate, if any, will pass under such will. In this case the husband, though he may not be entitled to take probate of his wife's will, may administer to such of her effects as do not pass under the will.

In cases, also, where a question arises on the construction of a will, and where the actual appearance of the paper may be supposed to be of assistance to the court of construction, as, for instance, where a question arises whether a person has signed a paper under such circumstances as to lose his legacy as a legatee, the court will sometimes grant probate *in fac simile*.

The 24 & 25 Vict. c. 144, contains a very important enactment with regard to the wills of British subjects made out of the United Kingdom. It is declared by that act, "that every will and other testamentary instrument made out of the United Kingdom by a British subject, whatever may be the domicile of such person at the time of making the same, or at the time of his or her death, shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England to probate, and in Scotland to confirmation, if the same be made according to the form required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the law then in force in that part of her Majesty's dominions where he had his domicile of origin" (b); and no will, or other testamentary instrument, will be held to be revoked, or to have become invalid, nor will the construction thereof be altered by reason of any subsequent change of domicile of the person making the same (c).

Non-contentious business relating to administrations consists in granting [* 429] administrations in the ordinary way to * the widow or next of kin of the deceased, on their giving the usual administration bond, and of granting certain special administrations to meet the requirements of different cases. As, for instance, administration *ad colligenda bona* is granted in cases where there is some pressing urgency for getting in the estate of the testator, and where damage to the estate would accrue by waiting the usual time for obtaining a grant of administration; but this is a grant which is only made under very special circumstances, and without any peculiar regard to the interest of the party who applies for it. Also grants *de bonis non administratis*, where an executor or administrator dies leaving part of the deceased's goods unadministered, and this is usually made to those persons who would have been entitled to the administration in the first instance. Also administration *durante minore ætate*, when the person appointed executor, or entitled to administration, is a minor, and it is necessary to appoint an administrator to act till he attains his majority; administration *durante absentia*, limited to the absence from the country of the person appointed executor; administration *cum testamento annexo*, when the deceased has made a will, but not appointed an executor, or where the appointment fails; also administration *pendente lite*, and other limited and special administrations fitted to meet the requirements of particular cases.

The court has also very full powers under the 73rd section of The Court of Probate Act, 1857, where a person has died intestate, or leaving a will, but no

(b) Sect. 1.

(c) Sect. 3.

executor willing to take probate, or where the executor is out of the United Kingdom, and it appears to the court to be necessary or convenient by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be administrator other than the person who would otherwise have been entitled to the grant to appoint any person it shall think fit, upon his giving such security as the court shall direct. This is a * provision which was introduced for the first time by the legislature [* 430] in the Court of Probate Act, 1857, and has been found to be attended with the greatest possible convenience in the administration of the property of deceased persons.

The court also makes grants of probate or of administration in cases where there is no direct evidence of the death of the party whose estate it is sought to administer. As, for instance, when a man has sailed on a **Presumption of death.** voyage, and nothing has since been heard of the ship or crew, or after an unexplained absence for seven years, the court acting on the principles of the common law will presume him to be dead, and permit the executor or administrator to swear that he died on or after the day upon which he was last heard of. Also, in the case of two or more persons dying at the same time, when it is impossible to prove which survived the other, *e. g.*, a husband and wife dying in a shipwreck or a massacre, the court will grant administration to the husband as a widower, allowing the administrator to swear that there was no reason to believe that the wife survived her husband.

The business of proving a will or codicil is commenced by the entry of a caveat, or by the issuing of a citation, and the defendant having appeared to the citation, or in answer to the warning of the caveat, the **Contentious business.** contentious proceedings are said to have commenced. The first step **Probate.** in these proceedings is for each party to file his affidavit of scripts, and bring into court all the testamentary papers of the deceased in his custody, or under his control, and at the same time to make affidavit that no other testamentary papers of the deceased have come to his hands, possession, or knowledge, before or since the death of the testator. If there are any testamentary papers in the hands of persons not parties to the suit, which it is necessary or desirable to have brought into court, the judge has power to issue a subpoena to such third persons commanding them to bring such * papers into the registry, and in the event of their non-compliance [* 431] with the terms of such subpoena, to enforce their obedience by attachment. The scripts having been filed, the party propounding the will files his declaration, to which the other party pleads, and issue is joined. This having been done, the court directs the trial either before itself alone, or by a special or common jury, or where the property, if real estate, is situate in the country, or where the expense of bringing the witnesses up to town would be considerable, then before a judge of assize; and where the personalty is under 200*l.*, and the realty under 300*l.*, the suit may be determined in the county court. The court has also power to grant a discovery of documents, to issue orders and commissions for the examination of witnesses, and to make such other orders in reference to the trial of its suits as are made by the courts of common law and equity.

The questions for determination in a probate suit, independent of the question of the right of the party to contest the validity of the will, resolve them-

selves usually into questions of the execution of the will according to the requirements of the Wills Act, of the testamentary capacity of the deceased, and of his knowledge and approval of the contents of his will, affirmative proof of which issues lies upon the party propounding the will. Also whether the will has been wholly or in part obtained by undue influence, or by fraud, or whether the will has been wholly or in part revoked by the testator, affirmative proof of which issues lies upon the party opposing the will, and these issues are tried by the same rules of evidence as are observed in the courts of common law. The heir-at-law, when the will affects the real estate, having been made a party to the proceedings, is entitled, if he thinks fit, to appear and plead, and take part in the proceedings; and similarly the next of kin, and persons who have obtained leave to intervene in the suit, as interested [* 432] under former wills or otherwise, may, subject to * any order of the court as to costs, also appear and take part in the proceedings, their actual share in the trial of the issues joined in the suit being regulated by the discretion of the presiding judge.

The different issues in the suit having been disposed of, the court pronounces either for or against the will, and exercises its discretion as to the condemnation of the several parties in the costs of the suit. The
Costs. next of kin, however, of a deceased, are entitled upon giving notice that they merely insist on the will being proved in solemn form of law, and only intend to cross-examine the witnesses produced in support of the will, to put the executor upon such proof of the will, without the liability of being themselves condemned in costs.

The court has power to grant new trials of jury causes and rehearing of non-jury causes, and any party dissatisfied with the judgment of the court may appeal to the house of lords as of right from a final decree, and by leave of the judge from interlocutory decrees or orders.
Appeal.

Where the right to administration is contested in an interest suit, the parties propound their different interests by declaration and plea, and their right is determined by the court as in a probate suit; but where there
Administration. is no dispute as to the relationship or the interest of the party, and where the only question is to which of several applicants the administration is to be granted, the practice usually is for one party to file what is termed an act on petition, to which the other party files an answer, the averments of which are supported by affidavit, and the matter is disposed of by the judge on the consideration of such petition and answer and affidavits.

As an incident to the trial of both probate and administration suits, the judge has power to appoint an administrator *pendente lite* to deal with the personalty, and a receiver to deal with the real estate, and has the same power to enforce its various decrees and orders as is now possessed by the court of chancery.

[* 433] * Where, however, a question of legitimacy or of pedigree is to be determined, then the process usually is for the party to declare as next-of-kin, and set out his pedigree, and the case is tried in a somewhat similar manner to an action of ejectment, where the heir-at-law has to make out his title to the estate. Questions of interest also frequently arise as incidents to a suit for the obtaining or revoking of probate, because every person appearing to oppose the executor, or other person who is seeking probate

of a will or administration with a will annexed, has to set out in his appearance the character in which he appears, and the interest which he affects to take in the estate of the testator; and it is competent to such executor or other person to dispute his right to appear in such capacity, and call upon him to state in a declaration the actual interest which he so takes. This declaration is then pleaded to, and the proceedings take the form of an interest suit. (588)

* CHAPTER XVI.

[* 434]

THE HIGH COURT OF ADMIRALTY.

THE high court of admiralty is a court of very great antiquity, tracing back at least as far as the time of Edward III., and it formerly entertained not only civil suits, but it also had an extensive criminal jurisdiction.

Jurisdiction. The latter, however, so far as it relates to crimes committed at sea, is now exercised by the commissioners of the central criminal court, or by judges of assize, as the circumstances may require; and the civil jurisdiction has of late years been greatly modified and extended so as to bring it more into accordance with the requirements of the times. It exercises a jurisdiction equitable as well as legal, and has a similar power of enforcing its decrees and orders to that possessed by courts of common law. It has, also, power to make and issue such rules, and give such directions for the trial of suits, as may from time to time be necessary for that purpose. By the 24 Vict. c. 10, the high court of admiralty is constituted a court of record for all intents and purposes, and has power to proceed either *in rem* or *in personam*: *in personam* by calling upon the masters or owners of vessels to show cause why they should not appear and defend the suits instituted against them; and *in rem* by arrest of the ship itself, which is only released upon bail being given to the full amount of the claim and costs likely to be incurred in the suit. The court formerly, also, under certain circumstances, proceeded by arrest of the person of the defendant. This process, however, seems of late years to have fallen * into disuse. The Admiralty Court Act of 1861 (24 Vict. c. 10) [* 435] has considerably extended and improved the procedure and practice of the court, and by virtue of that act, and also by the original jurisdiction possessed by the court, it can now try nearly all maritime questions which arise in reference to British and foreign ships. (589)

(588) The law of granting administrations in the United States is founded upon the English statutes of 31 Edw. III, c. 11, and 21 Hen. VIII, c. 5; and cognizance of such matters has been assigned to the courts and magistrates of civil jurisdiction. In some of the States the jurisdiction concerning the probate of wills and the administration of testators' and intestates' estates is vested in the county courts. In others it is confided to courts of special jurisdiction, under the various names of the court of probate, the registers' court, the orphan's court, the court of the ordinary, and the surrogate's court. 2 Kent's Com. 409, note b.

(589) The constitution of the United States provides that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction." U. S. Const., art. 3, § 2. And the
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The suits usually entertained by the court are for the purpose of enforcing bottomry or respondentia bonds; to obtain salvage awards; to enforce the payment of money due for necessities supplied to a ship, or for wages due to the master or crew, or for towage or pilotage services; to recover damages in cases of collision, and of damage done by any ship; also in cases of damage to goods, or in respect of breaches of contract, where the owners of the vessel are domiciled abroad. The court also entertains questions of prize and booty of war, but it exercises this jurisdiction by virtue of a warrant issued for that purpose, giving it special jurisdiction in that behalf.

With regard to respondentia and bottomry bonds, the master of a ship has a right to give one or more bonds, in the nature of mortgages, upon his ship for such amount as may be necessary to enable the vessel to proceed on its journey and to complete its voyage. These bonds constitute a liability, which attaches to the ship, notwithstanding it may be sold by the owner and the money received by him without any notice to the purchaser of such bond. The same rule applies to the case of a respondentia bond; the difference between that and a bottomry being, that whilst in bottomry the master pledges the ship and freight as well as the cargo, in respondentia the cargo alone is pledged. In enforcing these bonds the last is given precedence over those previously executed; and the court takes into consideration the circumstances under which the loan was effected, and, provided the bond itself is of such a nature as to lead it to believe that there has been no fraud in its inception, and that it represents a *bond fide* transaction, enforces [* 436] the bond, * notwithstanding the usual formalities of a bond of that nature have not been complied with.

The 3 & 4 Vict. c. 65, s. 6, gives the court jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage. Salvage claims are usually enforced in the first instance by an arrest of the vessel, if the vessel can be arrested by the salvors who make the claim; and the court, in making its award, considers whether the salvage has had reference to the preservation of life, or of the ship, or of the cargo, and makes such award as it thinks proper, acting upon the principle, that the preservation of life is entitled to a higher reward than the salvage of ship or cargo.

The same section gives the court power to decide and enforce claims in the nature of towage, or for necessities supplied to any foreign ship or sea-going vessel. This provision is extended by the 5th section of the Admiralty Court Act, 1861, by which it is declared, that the Court of Admiralty shall have jurisdiction over any claims for necessities supplied to any ship elsewhere than in the port to which the ship belongs,

judiciary act of September 24, 1789, c. 20, § 9, provides that the district courts shall have "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of common-law remedy, where the common law is competent to give it," etc. 1 U. S. Stat. at Large, 76. From the district courts, causes may be removed, in certain cases, to the circuit courts, and from thence to the supreme court of the United States.

unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales, provided, however, that unless the plaintiff recover 20% he will not be entitled to any costs, unless the judge certifies that the case is a fit one to be tried in that court. The court has, also, by the 4th section of the same act, jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds are under arrest of the court.

The 7th section of the act gives the court jurisdiction over any claim for damage done by any ship, thus conferring upon it the most extensive power in collision and similar cases. And so liberally has this power been construed that it has been held to give the court jurisdiction * to award compensation to a diver who had been injured by the paddle of a steamer passing over him (a), and to extend to the case of a collision between two foreign vessels in foreign waters (b). [* 437]

It also, under the 6th section of the act, has jurisdiction over any claim by the owner, or consignee, or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the master or crew of the ship, unless it is shown to the satisfaction of the court at the time of the institution of the cause that any owner or part owner of the ship is domiciled in England or Wales. It has, also, jurisdiction under the 8th section of the act to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, or employment, or earnings of any ship registered at any port in England or Wales, or any share thereof, and it may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the ship, or any share thereof, to be sold, and may make such order in relation to the matter in dispute as it shall think fit.

It also has jurisdiction by the 11th section over claims by way of mortgage, whether the ship, or the proceeds thereof, be under arrest of the court or not.

It also, by the 10th section, entertains claims by seamen for wages earned on board a ship, whether by virtue of a special contract or otherwise, and also claims for wages or disbursements by the master of a ship, provided always that unless the plaintiff recover 50% he does not get his costs, unless the judge grant a certificate to entitle him to them.

It also has an original jurisdiction to enforce claims for pilotage, and may issue orders in suits of restraint to prevent the sale of the whole or any part of the ship; * and it may, by its order, remove the master of a ship where his removal appears to be necessary. [* 438]

The powers exercised by the high court of admiralty have recently, by the 31 and 32 Vict. c. 71, been conferred on certain county courts, by virtue of which they are entitled to try claims for salvage where the property saved does not exceed 1000%, or where the amount claimed does not exceed 300%; claims for towage, necessities, or wages where the amount claimed does not exceed 160%; claims for damage to cargo, or for damage by

(a) *The Sylph*, 2 L. R. Ad. & Ecc. 24.

(b) *The Courier*, 1 Lush. 541.

collision where the amount claimed does not exceed 300*l*. They have also jurisdiction (by the 32 & 33 Vict. c. 51) to try and determine any claim arising out of any agreement made in relation to the hire of any ship or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l*. This proviso, however, does not prevent the parties from trying all such suits in the county court, although the claim exceeds the amount above limited, if they agree in writing that such county court (being a county court having admiralty jurisdiction) shall have jurisdiction to try the case.

The judge of the county court may also (by section 5 of the last-mentioned act), at the request of either party, be assisted by two mercantile assessors.

An appeal from any final decree, or order of the county court, in an admiralty case, or by permission of the judge of the county court, from any interlocutory decree or order therein, lies to the high court of admiralty, subject to security for costs being given. No appeal, however, lies from any decree or order of the high court of admiralty made on appeal from the county court, except by the express permission of the judge of the high court of admiralty, and no appeal lies unless the amount decreed or ordered to be due exceeds the sum of 50*l*.

[* 439] The practice of the Court of Admiralty is regulated by * the rules and orders of November, 1859, by virtue of which parties are entitled to prove their case, subject to their complying with the necessary formalities, either by affidavit, by written depositions, or by the oral examination of witnesses in open court, or partly by one mode and partly by another. In all cases, however, where the oral examination of witnesses can be had, it is the practice of the court to incline towards that mode of taking the evidence.

The court, at the hearing of the cause, has power to summon to its assistance Trinity Masters to sit as assessors, and it usually does so in cases requiring for their determination any peculiar knowledge of nautical science. Thus in cases of collision it is almost a matter of course for the court to require the presence of the Trinity Masters upon application from either party for that purpose; and there is power under the Admiralty Court Act, 1861 (section 8), for the court to make an order for the Trinity Masters to inspect any ship, or other property, the inspection of which may be material to the issue in the cause.

The appeal from the high court of admiralty is to the Judicial Committee of the Privy Council. It lies, as of course, from any final decree or sentence of the court; but from any interlocutory decree or order, it lies only by permission of the judge.

* CHAPTER XVII.

[* 440]

ECCLESIASTICAL COURTS, ETC.

THESE courts formerly exercised a very extended jurisdiction, comprising within their scope the determination of all testamentary causes and suits, and the granting of probates and letters of administration. They also entertained matrimonial suits, and had power to decree a divorce *a mensâ et thoro*, and to give the relief, now granted by the court of divorce, except, as has been before stated, the dissolution of the marriage tie. Their powers, however, of late years have been very considerably restricted. Thus, their jurisdiction over all matters and causes testamentary, including suits for legacies, or for the distribution of residues, was taken from them by the 20 & 21 Vict. c. 77, and conferred upon the court of probate. Their jurisdiction in matrimonial matters and suits was taken from them by the 20 & 21 Vict. c. 85, and conferred upon the court for divorce and matrimonial causes. Their jurisdiction in the matter of church rates, which was formerly a most fruitful source of litigation, has been abolished by the 31 & 32 Vict. c. 109, which declares that, after the passing of that act, "no suit shall be instituted, or proceeding taken, in any ecclesiastical or other court, to compel the payment of any church rate made in any parish or place in England or Wales." Their jurisdiction, also, in cases of brawling, except as between persons in holy orders, has been taken away by the 23 & 24 Vict. c. 32, which has given power to justices of the peace to fine or imprison persons found guilty of * unlawfully interfering with any clergyman in holy orders during [* 441] the service, or of making disturbances in churches or chapels, churchyards or burial grounds. And the jurisdiction to entertain suits for defamation was abolished by the 18 & 19 Vict. c. 41. During the last session of parliament, also, a bill was introduced for the purpose of further altering their jurisdiction, and re-moulding their procedure; and although such bill failed to become law, it is extremely probable that some considerable alterations will shortly be made both in their jurisdiction and in their procedure. In the view of such probable legislation, therefore, it is hardly necessary to do more than allude cursorily to the powers and the ordinary process of these courts.

The business of the ecclesiastical courts, of which the principal are the consistory courts of the bishop of each diocese, and the court of arches, which sits at Westminster, is now mainly confined to inquiring into charges of heresy, of improperly conducting the service of the church, and of immoral or scandalous conduct on the part of clergymen. These suits, which are of a criminal nature, are preceded by an inquiry under a commission issued by the bishop of the diocese in which the offence is alleged to have been committed, and a consequent report of the commissioners to the effect that there are sufficient *prima facie* grounds for instituting further proceedings. The charges are usually for neglect of duty as a clergyman, or violation of the duties of the sacred office, for scandalous or immoral conduct, for brawling in a church or churchyard, for simony, or for maintaining doctrines, or performing divine service in a manner contrary to the articles of religion as by law established.

These courts have also jurisdiction to entertain suits of a quasi criminal nature against laymen, for gross immorality, for damaging the church or the churchyard, or not repairing the chancel or aisle when it is incumbent on them to do so: also against churchwardens for neglect of * duty in respect of the fabric of the church, or the providing of the necessary robes or elements for the clergy: and against any person for defacing or removing the monuments or the pews, or otherwise improperly interfering with the church or churchyard without a faculty previously granted by the ordinary.

They also entertain certain suits of a civil nature, as, for instance, a suit known as a suit for perturbation of seat, where a party claims to be entitled to a certain pew or seat in a church from which he has been excluded; and which may be brought either against the churchwardens, to secure the claimant's quiet enjoyment of his seat, or against the actual intruder, to compel him to prove his title or to cease his intrusion for the future. In respect of this right, however, an action for trespass will also lie at common law against the intruder, where the plaintiff can show by prescription a right to the seat or the pew which he claims.

When, also, it is desired to make such alterations in a church or churchyard as require to be authorised by a faculty (or permission) from the ordinary, the ordinary, before granting such faculty, causes all persons having an interest in opposing the grant to be cited to show cause why such grant should not issue, and in the event of any persons appearing to show cause against the issuing of the grant, a suit becomes instituted, and the parties are heard, their various objections are considered, and judgment is given, as in an ordinary suit.

The procedure of these courts is usually by citation, libel or articles, and answer. Formerly the evidence was taken upon depositions by examiners; now, however, by the 17 & 18 Vict. c. 47, the ecclesiastical courts are empowered to take evidence *vidæ voce*, and this is the course usually pursued.

The court of arches, above referred to, is the court of appeal from the different diocesan courts in the province of Canterbury, and is presided over by a judge, called the * Dean of Arches, who sits as deputy to the archbishop, and is supposed to have received that title from originally holding his court in the church of St. Mary-le-Bow (a). It, also, to a certain extent, is a court of original jurisdiction, as it habitually takes cognizance of all such suits as the several bishops or inferior tribunals in the province may submit to its determination by letters of request.

A final appeal from the decision of the court of arches lies to the judicial committee of the privy council.

A jurisdiction somewhat analagous to that exercised over clergymen by the ecclesiastical courts is exercised over soldiers by courts martial. These courts, which exist solely for the trial of military offences committed by persons in the army or navy, regulate their proceedings according to the articles of war and the provisions of the Mutiny Act, which is re-enacted,

(a) Sancta Maria de Arcubus.

with but slight modifications, in each session of parliament. They are empowered to take evidence upon oath, and to inflict the necessary punishments for such offences, including judgment of death. Their procedure has, however, of late years been the subject of much comment, and it is probable that before long it will be subjected to considerable revision. So long, however, as courts martial act within their jurisdiction, taking cognizance only of such offences as are contrary to the articles of war, and inflicting such punishments as they are competent to inflict, the courts of common law will not interpose, either to question the propriety of their sentences, or to investigate the grounds upon which they arrive at their decisions. (590)

* CHAPTER XVIII.

[* 444]

THE COUNTY COURT, AND SOME OTHER COURTS OF LIMITED JURISDICTION.

THE county court is a local tribunal, originally instituted by the stat. 9 & 10 Vict. c. 95, held at prescribed periods in the district assigned to it, and presided over by a single judge or his duly appointed deputy. So much of the business of this tribunal as is routine, or other than judicial, being principally performed by the registrar.

The county court has had conferred upon it by many statutes separate branches of jurisdiction, so that it administers not merely the common law, but likewise equity (a) and bankruptcy (b), and discharges duties in regard to probate and administration (c), as a court of admiralty (d), and otherwise. We shall here, however, treat only of the two most important branches of county court jurisdiction, viz., that which it originally possessed under the 9 & 10 Vict. c. 95, as extended by subsequent statutes (e), and that which was given to it by the 28 & 29 Vict. c. 99, amended by the 30 & 31 Vict. c. 142. (591)

(a) 28 & 29 Vict. c. 99; 30 & 31 Vict. c. 142, ss. 8, 9, 24-27.

(b) See particularly 32 & 33 Vict. c. 71, which comes into operation on January 1, 1870.

(c) 20 & 21 Vict. c. 77; 21 & 22 Vict. c. 95.

(d) 31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51.

(e) 9 & 10 Vict. c. 95, s. 58; 13 & 14 Vict. c. 61, s. 1; 19 & 20 Vict. c. 108, ss. 23, 24; 30 & 31 Vict. c. 142.

(590) Courts-martial for the regulation of the militia are held in the several States under local statutes. In their general features they resemble those provided for in the army of the United States; and when in actual service, the militia, like the regular troops, are subject to courts-martial, composed, however, of militia officers. The jurisdiction of such courts extends only to offenses against the military law, committed by individuals in the service. *Smith v. Shaw*, 12 Johns. 257; *Mills v. Martin*, 19 id. 7. See *Ex parte Milligan*, 4 Wall. (U. S.) 2. A want of jurisdiction either of the person, or of the offense, will render the members of the court and officers executing its sentence trespassers. *Id.*; *Brooks v. Adams*, 11 Pick. (Mass.) 441; *Wise v. Withers*, 3 Cranch, 331; *Ex parte Biggers*, 1 McMull. (S. C.) 69; *Mitchell v. Harmony*, 13 How. (U. S.) 115. See *Vanderheyden v. Young*, 11 Johns. 150.

As to the jurisdiction of naval courts-martial over civil crimes committed at sea, see *United States v. Mackenzie*, 1 N. Y. Leg. Obs. 371; *Mutter of Martin*, 45 Barb. 142; S. C., 31 How. 228; *Wilson v. Mackenzie*, 7 Hill, 95; 1 Kent's Com. 341, note.

(591) County courts, of widely varying powers, exist in many of the States of the Union,

As introductory to our remarks upon the actual jurisdiction of the county court, we may observe that no action * which can be brought therein, [* 445] is now maintainable in an inferior court not of record (*f*); and if an action be brought in any other than a superior court of law which could have been brought in a county court, and the verdict recovered be for less than 10*l.*, the plaintiff will not be entitled to recover from the defendant a greater amount of costs than he would have been allowed if the action had been brought in the county court, unless the judge certify that it was fit to be brought elsewhere (*g*). With respect also to any action which may be brought in a superior court of common law, both parties may agree, by a memorandum duly signed, that a county court named therein shall have power to try such action, and thus give it jurisdiction so to do (*h*). But where an action is commenced in a superior which might have been brought in the county court, the consequence will either be its compulsory removal into such latter court, or loss of costs by the plaintiff (*i*). And further, if an action be brought in a county court which that court has no jurisdiction to try, the judge will order the cause to be struck out, unless the parties consent to the court having jurisdiction to try the same (*k*). By the provisions here referred to (*l*) has the legislature especially endeavoured to induce litigants to resort to local courts, recently established for the adjustment of limited demands,—to deter them, on the one hand, from harassing our judges, whose attention is occupied with matters of greater moment; on the other hand, from appealing for justice to courts incompetent properly to administer it, antiquated or obsolete.

The county has, at present, jurisdiction to entertain any action of contract, where the “debt, damage, or demand,” does not exceed the sum of 50*l.*, whether “on balance of account or otherwise,” or “after [* 446] an admitted * set-off” (*m*). This court may accordingly take cognizance of an action upon a bill of exchange, or for the recovery of goods *in specie* within the value of 50*l.*; though not of an action upon a judgment recovered in a superior court (*n*); nor where the claim is for beer consumed on the premises where sold or supplied, or money lent for obtaining the same (*o*).

A plaintiff cannot, however, divide any cause of action, for the purpose of bringing two or more suits in a county court (*p*); but, though claiming “a debt, damage, or demand” for more than 50*l.*, he may, if so minded, “abandon the excess” and recover there to an amount not exceeding 50*l.* (*q*).

The consequence, as regards costs, of suing for breach of contract in a superior court, where the claim might have been heard in the county court, will be presently noticed; we may, however, here observe, that where in an action of contract brought in a superior court, “the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment, an admitted set-off, or otherwise to a sum not exceeding 50*l.*,” it is competent to the defendant if he contest the whole or part of the

(*f*) 80 & 81 Vict. c. 142, s. 28.

(*g*) *Id.* s. 29.

(*h*) 19 & 20 Vict. c. 108, s. 23.

(*i*) *Post*, pp. 448, 449.

(*k*) 80 & 81 Vict. c. 142, s. 14.

(*l*) See, also, 15 & 16 Vict. c. 54, s. 7, cited *post*.

(*m*) 9 & 10 Vict. c. 95, s. 58; 18 & 14 Vict. c. 61, s. 1; 19 & 20 Vict. c. 108, s. 24.

(*n*) 19 & 20 Vict. c. 108, s. 27.

(*o*) 80 & 81 Vict. c. 142, s. 4.

(*p*) 9 & 10 Vict. c. 95, s. 63; 18 & 14 Vict. c. 61, s. 1. *Grimby v. Aykroyd*, 1 Exch. 479; judgment in *Wood v. Perry*, 3 Exch. 445.

(*q*) *Id.*

plaintiff's demand, to call upon him by summons to show cause before a judge at chambers why such action should not be tried in the county court, or one of the county courts in which it might have been commenced, and the judge will, unless there be good cause to the contrary, order that the action be there tried accordingly (*r*). Also, where in an action of contract brought in a superior court "the claim indorsed on the writ does not exceed 50*l*., or where such claim, though * it originally exceeded 50*l*., is reduced by payment [* 447] into court, an admitted set-off, or otherwise to a sum not exceeding 50*l*.," it is enacted by 19 & 20 Vict. c. 108, s. 26, that a "judge of a superior court, on the application of either party after issue joined, may in his discretion, and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name," and the trial will take place there accordingly (*s*).

Although the county court, as originally constituted, had a jurisdiction limited in amount over "all pleas of personal actions," and consequently in tort as well as in contract, the following cases were nevertheless till

Tort. recently wholly, or save by consent of parties (*t*), excluded from the jurisdiction of the court (*x*), viz., any action of ejectment; or in which the title to a corporeal or incorporeal hereditament, or to any toll, fair, market, or franchise might be in question; any action in which the validity of a devise, bequest, or limitation under a will or settlement might be disputed (*y*); any action for a malicious prosecution, or for libel, slander, seduction, or breach of promise of marriage. A great extension of jurisdiction has, however, been recently given to the county court in respect of some of the matters above enumerated. For an action of ejectment (*z*) now lies there, where neither the value of the lands, tenements, or hereditaments claimed, nor the rent payable in respect thereof exceeds the sum of 20*l*. yearly (*a*). The county court has now jurisdiction to try an action in which the title to any corporeal or incorporeal hereditament may come in question, where neither the value of the land, tenement, or hereditament in dispute, nor the rent payable in respect thereof, exceeds the sum * of 20*l*. by the year, or in case of an ease- [* 448] ment or licence where neither the value nor reserved rent of the land, tenement, or hereditament in respect of which the easement or licence is claimed, or on, through, over, or under which such easement or licence is claimed, exceeds such sum yearly: "Provided that the defendant in any such action of ejectment, or his landlord, may, within one month from the day of service of the writ, apply to a judge at chambers for a summons to the plaintiff to show cause why such action should not be tried in one of the superior courts on the ground that the title to lands or hereditaments of greater annual value than 20*l*. would be affected by the decision in such action:" and on the hearing of such summons the judge, if satisfied that the title to other lands would be so affected, may order such action to be tried in a superior court, and, thereupon, proceedings in such action in the county court will be discontinued (*b*). More-

(*r*) 30 & 31 Vict. c. 142, s. 7.

(*s*) See also 19 & 20 Vict. c. 108, s. 39.

(*t*) *Ante*, p. 445.

(*x*) 9 & 10 Vict. c. 95, s. 58; 19 & 20 Vict. c. 108, s. 23.

(*y*) The county court judge has jurisdiction, however, in regard to a claim for "any

legacy under a will." 9 & 10 Vict. c. 95, s. 65; *post*, pp. 450, 461.

(*z*) *Ante*, p. 273.

(*a*) 30 & 31 Vict. c. 142, s. 11.

(*b*) 30 & 31 Vict. c. 142, s. 12. Prior to this enactment, however, the county court had jurisdiction in a case of distress for rent

over, any person against whom "an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort" is brought in a superior court, may now make affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff, and thereupon a judge of the court in which the action is brought may order that—unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the masters of the said court, or satisfy the judge that he has a cause of action fit to be prosecuted in the superior court—all proceedings in the action shall be stayed; or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the judge [* 449] as aforesaid, the judge of the superior * court may order that the cause be remitted for trial before a county court to be therein named, which will have like powers and jurisdiction with respect to the cause as if both parties had agreed, by memorandum (c), that it should have power to try the said action, and the same had been commenced therein.

We may add, that by stat. 19 & 20 Vict. c. 108, s. 25, where in any action in the county court "the title to any corporeal or incorporeal hereditament, or to any toll, fair, market, or franchise, shall incidentally come in question," the judge will have jurisdiction to decide the claim which it is the immediate object of the action to enforce, if both parties at the hearing consent, in writing, to the judge having such power; but the judgment of the court will not be evidence of title between the parties or their privies in any other action in that court, or in any proceeding in any other court; and such consent will not affect any right of appeal of either of the parties to the first-mentioned action.

Thus have the restrictions formerly imposed upon the jurisdiction of the county court in actions of tort been, under the provisions of the 30 & 31 Vict. c. 142, considerably relaxed, and we need only further observe as to this part of our subject that the jurisdiction of the local court has, by the Common Law Procedure Act, 1860, section 22, been extended to all cases of replevin (d), and is no longer confined, as it formerly was, by certain provisions of the statute 19 & 20 Vict. c. 108 (e), to the cases of goods distrained for rent or damage feasant.

The consequence of suing in a superior court for a debt, damage, or demand, recoverable in the county court may be serious; for should the plaintiff recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if in tort, whether by verdict, judgment by default, on demurrer, or otherwise, he will [* 450] not be entitled to any * costs of suit unless the judge certify that there was sufficient reason for suing in a superior court, or unless the court or a judge at chambers allow the costs (f).

Besides the matters already noticed, any demand not exceeding in amount 50*l.*, in respect of "the whole or part of the unliquidated balance of a partnership account," or "of a distributive share" of personal estate "under an intestacy," or "of any legacy under a will," is within the cognisance of the county court (g). This court is also in some cases invested with power to

although the title to the premises was disputed.

(c) *Ante*, p. 445.

(d) As to which, *ante*, pp. 259 *et seq.*

(e) Sects. 18 *et seq.*

(f) 30 & 31 Vict. c. 142, s. 5.

(g) 9 & 10 Vict. c. 95, s. 65; 18 & 14 Vict. c. 61, s. 1.

afford redress of an extraordinary kind, as on interpleader (*h*). And summary proceedings for enabling a landlord to recover possession of small tenements from a tenant, who holds after the determination of his term, may be taken either before justices of the peace, under the 1 & 2 Vict. c. 74, or before the judge of a county court under the 19 & 20 Vict. c. 108 (*i*). The former of these statutes applies where the premises are held at will, or for any term not exceeding seven years; and the tenant is liable either to pay no rent or a rent under 20*l.* a-year, and upon which no fine has been reserved or made payable (*k*). Proceedings under the county court statute are available where the ordinary relation of landlord and tenant exists, and are restricted to tenancies "where neither the value of the premises, nor the rent payable in respect thereof," exceeds the sum of 50*l.* per annum. If the term of tenancy of such premises has expired or been duly determined by notice, but the tenant persists in holding over, then upon the necessary proofs being adduced before the judge, he may order possession to be given to the landlord; and if such order be not obeyed, the registrar of the court may issue a warrant for possession (*l*). An appeal however lies in this case from * the county to a superior court, when the yearly rent or value of the premises exceeds 20*l.*, or by leave of the county court judge, where it [*451] is less (*m*) than that amount.

The practice of the county court is, at present, regulated by various statutes (*n*), and by rules made in pursuance of statutory powers (*o*). The general principles which govern the practice of the superior courts of common law (*p*) may also be applied at the discretion of the judges of the county courts to proceedings therein (*q*).

The suit in a county court is commenced (*r*) by plaint, which must be entered in the county court within the district of which the defendant or one of the defendants dwells or carries on his business at the time of bringing the action, or it may be entered, by leave of the judge or registrar, in the county court within the district of which the defendant or one of the defendants dwelt or carried on business, at any time within six calendar months next before the time of action brought, or, with the like leave, in the county court in the district of which the cause of action wholly or in part arose (*s*), unless, indeed, the plaintiff dwells or carries on his business, and the defendant likewise does so, within a metropolitan district, or in the city of London, in which case the plaint may be entered either in the plaintiff's or in the defendant's district (*t*).

* Upon entry of the plaint (*u*) a summons to appear is issued to the bailiff of the court (*x*), to be by him served on the defendant ten [*452]

(*h*) See, for instance, 30 & 31 Vict. c. 142, s. 31.

(*i*) Sects. 50-56.

(*k*) Sect. 1.

(*l*) 19 & 20 Vict. c. 108, ss. 50-56.

(*m*) 30 & 31 Vict. c. 142, s. 18.

(*n*) 9 & 10 Vict. c. 95; 12 & 13 Vict. c. 101; 18 & 14 Vict. c. 61; 15 & 16 Vict. c. 54; 17 & 18 Vict. c. 16; 19 & 20 Vict. c. 108; 21 & 22 Vict. c. 74; 23 & 24 Vict. c. 57; 25 & 26 Vict. c. 99 (which gives an equitable jurisdiction); 29 & 30 Vict. c. 14; 30 & 31 Vict. c. 142.

There are many statutes which relate to the jurisdiction and practice of county courts

in regard to particular matters, as to which see Poll. & N. Pract. County Court, 6th ed., Table of Contents, pp. viii, ix.

(*o*) See the Rules, Orders, and Forms for regulating the Practice of the County Courts, A. D. 1867.

(*p*) *Ante*, chap. 12.

(*q*) See 9 & 10 Vict. c. 95, s. 78.

(*r*) 9 & 10 Vict. c. 95, s. 59.

(*s*) 30 & 31 Vict. c. 142, s. 1.

(*t*) 19 & 20 Vict. c. 108, s. 18; 30 & 31 Vict. c. 142, s. 8.

(*u*) R. 37.

(*x*) R. 10.

clear days at least before the holding of the court at which it is returnable (*y*). To the summons is annexed a copy of the plaintiff's particulars of demand, in any case where they are required (*z*).

There are no written pleadings in a suit in the county court; but if any one or more of certain defences are intended to be set up, notice thereof, unless the plaintiff consent to waive it, must be given to him. These defences are set-off, infancy, coverture, the statute of limitations, and discharge under any statute relating to bankrupts (*a*). Any other defence is available to the defendant at the trial, whether by traverse or confession and avoidance, without any formal joinder of issue. Interrogatories may now by leave be delivered by either party to the suit to his adversary (*b*), and an inspection and discovery of documents may be obtained (*c*).

When no jury has been impaneled, the judge himself determines matters as well of fact as of law; but a jury may be summoned on the requisition of either party to the suit, as matter of right, should the amount claimed exceed 5*l.*; and in any case where such amount does not exceed 5*l.*, the judge may, on the application of either party, order the action to be tried by a jury (*d*).

Assuming that both parties to the suit appear, the judge, either with or without a jury, as the case may be, proceeds to hear the cause. If the defendant appears and admits the claim, the registrar may, by leave of the judge, [* 453] settle the terms and conditions upon which it is to be *paid, and may enter up judgment accordingly (*e*). And it is worthy of remark, that in any action brought in the county court for the price or value of goods or chattels which or some part of which were sold and delivered to the defendant to be dealt with in the way of his trade, profession, or calling (*f*), the plaintiff may, at his option, cause to be issued a summons in the ordinary form, or (upon filing an affidavit) in the form provided by statute (*g*), and if such last-mentioned summons be issued, it must be personally served on the defendant twelve clear days at least before the return day thereof, and then if the defendant do not, at least six clear days before such return day, give notice in writing, signed by himself, his attorney or agent, to the registrar of the court from which the summons issued, of his intention to defend, the plaintiff may, within two months after such return day, without giving any proof of his claim, have, upon proof by affidavit of the service of the summons, judgment entered up against the defendant for the amount of his claim and costs. The order upon such judgment will be for payment forthwith, or at such times, and by such instalments as the plaintiff has in writing consented to take at the time of entering the plaint. If, however, the defendant give such notice as above specified, the action will be heard in the ordinary course; and in any event the registrar will, immediately after the last day for giving such notice, inform the plaintiff by letter whether the defendant has or has not given notice of his intention to defend.

If the action brought in the county court be founded on contract, and the

(*y*) 9 & 10 Vict. c. 95, s. 59, and r. 51. As to the mode of service generally, see rules 52 *et seq.*

(*z*) See rules 43, 44.

(*a*) 9 & 10 Vict. c. 95, s. 76; and see rules 88-93.

(*b*) C. L. Proc. Act, 1854, ss. 51, 52, applied

to county courts by order in Council, Nov. 18, 1867. Rules 80-82.

(*c*) C. L. Proc. Act, 1854, s. 50, applied as above to county courts. Rules 76-79.

(*d*) *Ib.* s. 70; rules 77, 104, 107.

(*e*) 30 & 31 Vict. c. 142, s. 17.

(*f*) *Ib.* s. 2.

(*g*) *Ib.* Sched. (B).

defendant does not appear at the hearing, either in person or by some one duly authorised on his behalf, and no sufficient excuse for the defendant's absence be shown, the registrar may, by leave of the judge, upon due proof of the service of the summons and of the debt being due and owing, enter up judgment for * the plaintiff, and have the same power to make an order for payment by instalments, or to enter up judgment of nonsuit, or to strike out or adjourn the cause, as the judge of the court has; but the judgment so entered up, and any execution thereon, may be set aside, and a new trial granted, upon such terms, if any, as the judge may think fit to require (h).

Should neither counsel nor attornies attend, at the hearing of a suit in the county court, the judge must endeavour to elicit from the parties and their witnesses (whose attendance is procured by summons (i)), such facts as will enable him to determine the question or questions in dispute. When the case is closed on both sides, the judge, if unassisted by a jury, decides both on fact and law; but, if assisted by a jury, he will direct them in point of law, whilst they decide upon the facts. Judgment is then given for the plaintiff or defendant—unless, indeed, the former be nonsuited—and entered on the minutes of the court. The judge also directs the mode of payment (which in certain cases may be by instalments), of any sum to which he may find the plaintiff entitled (k). The costs of the action abide the event, unless otherwise ordered by the judge, and execution may issue for them (l).

When the judgment has been entered up, it may be enforced by execution against the goods, leviable by writ of *fiery facias*; (592) the wearing apparel and bedding of the judgment debtor or his family, and the tools and implements of his trade, to the value of 5*l.*, being, however, protected from seizure (m).

Execution against the person may be obtained on * summons, where default is made in complying with the order of the judge for payment of the money recovered (n). [* 455]

It is competent to either party, dissatisfied with the verdict or decision of the case, to apply for a new trial, which the judge may in his discretion order to take place before a jury, although the action was not originally so tried (o).

The mode of removing a cause from the jurisdiction of the county court to that of a superior court, is by writ of *certiorari*. The right of so removing a cause exists at common law, but conditions have been annexed by statute to the exercise of the right in regard to cases in the county court. (593) By the 9 & 10 Vict. c. 95, a cause may be thus removed

(h) 30 & 31 Vict. c. 142, s. 16.

(i) 9 & 10 Vict. c. 95, ss. 85–87.

(k) 19 & 20 Vict. c. 103, s. 45; and rule 110.

(l) 9 & 10 Vict. c. 95, s. 88.

When an order has been made for the debt to be paid by instalments, execution will not issue till after default in payment of an instalment; and it may then issue for the whole sum due, *ib.* s. 85.

(m) 9 & 10 Vict. c. 95, ss. 94, 96; 8 & 9 Vict. c. 127, s. 8.

(n) See 9 & 10 Vict. c. 95, ss. 98, 99 (as modified by 22 & 23 Vict. c. 57). These provisions are repealed, as from Jan. 1, 1870, by the 32 & 33 Vict. c. 83, and for them is substituted, so far as applicable, s. 5 of the 32 & 33 Vict. c. 62.

(o) Rule 178.

(592) See, as to execution, and other modes of enforcing judgments, etc., 4 Wait's Pr. 1 *et seq.*

(593) As to the nature and office of the common-law writ of *certiorari*, see 5 Wait's Pr. 455, *et seq.*

when the debt or damage claimed exceeds 5*l.*, by leave of a judge of one of the superior courts, if the cause shall appear to him proper to be so removed, and on such terms as he shall deem fit to impose (*p*). But even if the claim in the county court do not exceed 5*l.*, it may, under the 19 & 20 Vict. c. 108 (*q*), be removed by *certiorari* to a superior court, if such court or judge shall deem it desirable that the cause be tried there, and if the party applying for the writ, shall give the security required by the act, and comply with the conditions imposed by such judge in the exercise of his discretion. One of the usual grounds for granting the writ is, that difficult questions of law will arise in the suit.

If either party to a suit in the county court, when the claim is for a sum between 20*l.* and 50*l.*, or when jurisdiction is given by agreement (unless the right of appeal is specially excluded also by agreement (*r*)), is dissatisfied with the determination or direction of the said court [* 456] in * point of law, or upon the admission or rejection of evidence, such party may appeal from the same to any of the superior courts of common law at Westminster (*s*). Before, however, the appeal is allowed to be prosecuted, sufficient security must be given by the appellant (*t*).

An appeal may be brought from the decision of a county court judge, on the same grounds and subject to the same conditions as specified in the 13 & 14 Vict. c. 61, s. 14, in any action of ejectment, or in which the title to a corporeal or incorporeal hereditament comes in question, and with the leave of such judge in any action in which an appeal had not previously been allowed (*u*).

And here may conveniently be mentioned two species of injuries, which may be done to suitors and others by courts of limited jurisdiction: they are—1, when justice is delayed by an inferior court having proper cognizance of the cause; and, 2, when such inferior court takes upon itself to examine and decide a cause without legal authority.

1. The first of these injuries, refusal or neglect of justice, is remediable at common law by writ of *procedendo*, or of *mandamus*. A writ of *procedendo* issues where the judge of a subordinate court delays the litigating parties, and will not give judgment, either on the one side or on the other, when he ought to do so. In this case a writ of *procedendo* will be awarded, commanding him in the queen's name to proceed to judgment; but without specifying any particular judgment, for the judgment, if erroneous, may be set aside or rectified: and upon further neglect or refusal, the judge of the inferior court may be punished for his contempt, by attachment (*x*).

The writ of *mandamus*, so far as it falls under our present consideration, is a command issuing in the queen's name from the court of queen's bench, and directed to an * inferior court of judicature within the queen's dominions, requiring it to do some particular thing therein specified, which the court of queen's bench has previously determined, or at least supposes to be consonant to right and justice. It is a high

(*p*) Sect. 90; 13 & 14 Vict. c. 61, s. 16.

(*q*) Sect. 88.

(*r*) 17 & 18 Vict. c. 16, s. 1.

(*s*) 13 & 14 Vict. c. 61, s. 14, as altered by 15 & 16 Vict. c. 54, s. 2. See 19 & 20 Vict. c. 108, s. 68.

(*t*) 13 & 14 Vict. c. 61, s. 14; see rule 124.

(*u*) 30 & 31 Vict. c. 142, s. 13.

(*x*) F. N. B. 153, 154, 240. See *Reg. v. Scalfs*, 18 Q. B. 773.

prerogative writ, extensively remedial in nature (y), and issues where the party has a right to have something done, and has no other specific means of compelling its performance. (594) A *mandamus* may, accordingly, issue to the judge of an inferior court, commanding him to do justice according to the powers of his office, whenever the same is delayed, or where he refuses to act (z). For it is the peculiar business of the court of queen's bench to superintend inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature has invested them: and this not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice. This writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below: whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made directing the party complained of to show cause why a writ of *mandamus* should not issue: and, if he shows no sufficient cause, the writ itself is issued, at first in the alternative, either to do thus, or signify some reason to the contrary; to which a return, or answer, must be made at a certain day. And, if the inferior judge, or other person to whom the writ is directed, returns or signifies an insufficient reason, then there issues in the second place a peremptory *mandamus*, to do the thing absolutely: to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior judge or other person * called upon makes no return, or fails in respect and [* 458] obedience, he is punishable for his contempt by attachment. But, if he, at the first, returns a sufficient cause, although it should be false in fact, the court of queen's bench will not try the truth of the fact upon affidavits. By virtue of the statute 1 Will. 4, c. 21, the party applying for the writ may, however, plead to, or traverse, all or any of the material facts contained in the return, and the party making it may reply, take issue, or demur, and by this mode of procedure damages and costs may be recovered, and a peremptory writ of *mandamus* may be awarded (a). Also, by the 6 & 7 Vict. c. 67, if the party

(y) A *mandamus* has been defined by Lord Mansfield (1 W. Bla. 352) to be a prerogative writ, flowing from the king himself, sitting in the court of king's bench, superintending the police and preserving the peace of the country.

(z) *Reg. v. Brown*, 7 E. & B. 757.

(a) No action can be brought for anything done in obedience to a peremptory *mandamus*. 6 & 7 Vict. c. 67, s. 3.

(594) In the United States, the authority to issue the writ of *mandamus* does not exist as a prerogative power of the courts, but is derived by grant from the government, through the constitution, or legislative enactments. And when the power has been granted in general terms to a court, it is to be governed by the common-law rules as to when it is proper to be issued. *Moses on Mand.* 17; *Matter of Turner*, 5 Ohio, 548; *Kentucky v. Dennison*, 24 How. (U. S.) 66. The writ is generally issued by the highest court of judicature having jurisdiction at law. *Com. v. Select and Common Councils of Pittsburgh*, 84 Penn. St. 496; *Peoria v. Grove*, 20 Ill. 525.

Two things must concur to entitle a party to the writ: *First*. That he has a legal right to have something done by the party to whom he seeks to have the writ directed, and which has not been done. *Second*. That he has no legal specific remedy to which he can resort to compel the performance of this duty. *State v. Nicholson Pavement Co.*, 35 N. J. L. 396. And see *Mansfield v. Fuller*, 50 Mo. 388; *State v. Bridgman*, 8 Kan. 458; *Fitch v. Diarmid*, 26 Ark. 482; *La Grange v. State Treasurer*, 24 Mich. 468; *Seymour v. Ely*, 87 Conn. 103.

As to the power of the supreme court of the United States to issue writs of *mandamus*, see Act of Congress, Sept. 24, 1789, § 13; 1 Stat. at Large, 81; *Marbury v. Madison*, 1 Cranch, 137; *Ex parte Bradstreet*, 13 Peters, 174.

prosecuting the writ wish to object to the validity of the return, he may do so by way of demurrer, upon which the same proceedings will be had as in a personal action; and the party aggrieved by the judgment, may sue out a writ of error in the same manner as a party to a personal action may do, and similar proceedings will be taken thereupon and costs awarded, as in ordinary cases of writs of error (*b*). An action will also lie at suit of the party injured for a false return to a *mandamus*, and damages may be recovered therein equivalent to the injury sustained, and likewise a peremptory *mandamus* may be obtained to the defendant to do his duty.

Such, as above stated, is the ordinary remedy for the injury of neglect or refusal to do justice by an inferior court. It has, however, been enacted (*c*), that no writ of *mandamus* shall issue to a judge or an officer of the [* 459] county * court for refusing to do any act relating to the duties of his office; but any person requiring such act to be done may apply to a superior court or a judge thereof, upon an affidavit of the facts, for a rule or summons calling upon such judge or officer of the county court, and also upon the party to be affected by such act, to show cause why the act specified should not be done; and if after the service of such rule or summons good cause be not shown, the superior court or judge thereof may by rule or order direct the act to be done, and the judge or officer of the county court, upon being served with such rule or order, must obey the same on pain of attachment.

2. Remedy where there is an encroachment of jurisdiction. 2. The other inquiry, *viz.*, that of encroachment of jurisdiction, or calling one *coram non judice*, to answer in a court which has no legal cognisance of the cause, is a grievance, for which the common law has provided a remedy by the writ of prohibition.

A prohibition is a writ issuing out of a superior court of law for the furtherance of justice, directed to the judge or party to a suit in an inferior court (*d*), or to both of them concurrently (*e*), commanding them to cease from * the prosecution thereof, upon a suggestion, that either the cause originally, or some collateral matter arising therein, does not belong to the jurisdiction of the court which entertains it, but to the cognisance of some other court. All lawful jurisdiction, it has been said (*f*), is derived from, and must be traced to the royal authority;

(*b*) By C. L. Proc. Act, 1854, s. 77, the provisions of the C. L. Proc. Acts, "so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of *mandamus*."

(*c*) 19 & 20 Vict. c. 108, s. 43.

The 11 & 12 Vict. c. 44, s. 5, has provided a procedure by rule, which may be employed instead of that by *mandamus*, for the purpose of determining any question as to the legality or illegality of any official act, which a justice of the peace may have refused to perform.

(*d*) From the opinion of the judges, delivered in *Mayor, &c., of London v. Cox*, L. R. 2 H. L. 280, may be collected certain tests by which to determine whether a court of justice is an inferior or superior court:—(1.) In an inferior court the declaration must show that the cause of action arose within its jurisdiction. (2.) Whereas the judgment of a superior court unreversed is conclusive as to

all relevant matters thereby decided, the judgment of an inferior court involving a question of jurisdiction is not final. 3. The plaintiff is liable to an action for executing the process of an inferior court beyond its jurisdiction, and cannot justify under such process, whether he knows of the defect or not, the judge and officer of the court being civilly liable if they knew of the defect of jurisdiction.

(*e*) *Mayor, &c., of London v. Cox*, L. R. 2 H. L. 280.

The court will not, in the exercise of this jurisdiction by prohibition, interfere on the application of a person who is a stranger, not in any way interested in the subject-matter of the suits sought to be prohibited, nor aggrieved by the alleged excess of jurisdiction. *Reg. v. Twiss*, L. R. 4 Q. B. 407, 418, with which compare L. R. 2 H. L. 279.

(*f*) *Mayor, &c. of London v. Cox*, L. R. 2 H. L. 254, citing 2 Inst. 602.

and any exercise, however fitting it may appear, of jurisdiction not so authorised, is an usurpation of the prerogative, and a resort to force unwarranted by law. Upon both of these grounds, therefore, *viz.*, the infringement of the prerogative, and the unauthorised proceeding against the individual, prohibitions will be granted to restrain the court from intermeddling with or executing anything which by law it ought not to hold plea of; *ex. gr.*, if in the lord mayor's court of London, which is an inferior court, the custom of foreign attachment should be extended to a case where neither the debt sued for nor the debt alleged to be due from the garnishee to the original debtor arose within the city, no one of the parties being a citizen or a resident within the city (*g*). Prohibition will also go to the county court, should it assume to try a matter not within the limits of its statutory jurisdiction (*h*). (595)

A short summary of the regular procedure in prohibition is as follows:—The party aggrieved in the court below applies to the superior court, setting forth in his affidavits the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom: upon which, if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues; commanding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point may be too *nice and doubtful to be decided merely upon [*461] motion: and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to declare in prohibition, the declaration concisely setting forth so much only of the proceeding in the inferior court as is necessary to show the ground of the application. To this declaration the defendant pleads or demurs, and the judgment is that a writ of prohibition shall or shall not issue. The action of prohibition is thus in effect nothing more than an issue directed in a disputed case only to inform the conscience of the court whether the court below has power to proceed; both parties are actors, and no damages can be recovered therein, unless the plaintiff in the inferior court proceeds after a previous prohibition (*i*). The practice connected with prohibition to a county court has, we may add, been modified by statute (*k*), so that the matter brought before the superior court, or a judge thereof, as the ground for granting the writ, is finally disposed of by rule or order, and no declaration or further proceedings in prohibition are allowed.

The equitable jurisdiction of the county court at present extends to—
(1.) Suits by creditors, legatees, whether specific, pecuniary, or residuary;

(*g*) See *Mayor, &c. of London v. Cox*, L. R. 2 H. L. 239.

(*i*) L. R. 2 H. L. 278; 1 Will. 4, c. 21, s. 1.

(*k*) 19 & 20 Vict. c. 108, ss. 40–42. See also

(*h*) See, for instance, *Eaton v. Rose*, L. R. 4 18 & 14 Vict. c. 61, s. 23.
Q. B. 4.

(595) The supreme court of the United States has power to issue writs of prohibition to the federal district courts, when proceeding as courts of admiralty and maritime jurisdiction. Act of Congress, Sept. 24, 1789, § 13; 1 Stat. at Large, 81. Thus, where the district court has no jurisdiction of a cause brought before it, a prohibition will be issued from the supreme court to prevent proceedings. *United States v. Peters*, 3 Dall. 121. In the several States the supreme court of the State may also issue the writ in proper cases. As to what are proper cases, see, generally, *Hanger v. Keating*, 26 Ark. 51; *Baldwin v. Cooley*, 1 S. C. 256; *Cody v. Lennard*, 45 Ga. 85; *People v. Wayne Circuit Court*, 11 Mich. 893; *Mayo v. James*, 12 Gratt. (Va.) 17; *People v. Clute*, 42 How. 157.

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devises, in trust or otherwise; heirs at law, or next of kin, in which the personal or real, or personal and real estate against or for an account or administration of which the demand may be made does not exceed in amount or value 500*l*. (*l*). (2.) Suits for the execution of trusts in which the trust estate or fund does not exceed in amount or value the like sum (*m*). (3.) Suits for foreclosure or redemption, or for enforcing any charge or lien, where the mortgage, charge, or lien does not exceed in amount [** 462*] the like sum (*n*). (4.) * Suits for specific performance of or for the reforming, delivering up, or cancelling of any agreement for the sale, purchase, or lease of any property where, in the case of a sale or purchase, the purchase money, or in case of a lease the value of the property, does not exceed the like sum (*o*). (5.) Proceedings under any of the trustees relief or trustee acts (*p*), in which the trust estate or fund to which the proceeding relates does not exceed in amount or value the like sum (*q*). (6.) Proceedings relating to the maintenance or advancement of infants in which the property of the infant does not exceed in amount or value the like sum (*r*). (7.) Any suit for the dissolution or winding-up of a partnership in which the whole property, stock, and credits of such partnership does not exceed in amount or value the like sum (*s*). And (8.) Proceedings for orders in the nature of injunctions, where the same are requisite for granting relief in any matter in which jurisdiction is given by 28 & 29 Vict. c. 99, to the county court, or for stay of proceedings at law to recover any debt provable under a decree for the administration of an estate made by the court to which the application for the order to stay proceedings is made (*t*).

In all suits and matters such as above enumerated the judge and officers of the county court have respectively the powers and authorities of those of the court of chancery (*u*). The suit being commenced by filing a plaint in equity (*x*), whereupon a summons is issued to the defendant to appear and submit to judgment, and the procedure thus initiated progresses in accordance with the regulations contained in the rules and orders promulgated respecting it (*y*).

[** 463*] * With respect to the court in which proceedings in equity are to be taken it is enacted that,—

(1.) Such as relate to the recovery or sale of any mortgage, charge, or lien on lands, tenements or hereditaments shall be taken in that county court within the district of which the said lands, tenements, or hereditaments, or any part thereof are situate (*z*). (2.) Proceedings under the Trustee Acts, 1850 and 1852, shall be taken in the county court within the district of which the persons making the application, or any of them, may reside (*a*). (3.) Proceedings for the administration of the assets of a deceased person shall be taken in the county court within the district of which the deceased person had his last place of abode in England, or in which the personal representatives, or

(*l*) 28 & 29 Vict. c. 99, s. 1.

(*m*) *Ib*.

(*n*) *Ib*.

(*o*) 30 & 31 Vict. c. 142, s. 9.

(*p*) *Ante*, pp. 77, 78. These proceedings are commenced by petition in the county court. Order xi. rule 1.

(*q*) 28 & 29 Vict. c. 99, s. 1.

(*r*) *Ib*.

(*s*) *Ib*.

(*t*) *Ib*.

(*u*) 28 & 29 Vict. c. 99, s. 2.

(*x*) Order i. rule 1.

(*y*) See the County Courts Orders and Rules in Equity, 1867.

(*z*) 28 & 29 Vict. c. 99, s. 10.

(*a*) *Ib*.

any one of them, shall have their or his place of abode (*b*). (4.) Proceedings in partnership cases shall be taken in the county court within the district of which the partnership business was or is carried on (*c*). (5.) Proceedings for the specific performance or the delivery up or cancelling of agreements shall be taken in the county court within the district of which the defendants, or any one of them, may reside or carry on business (*d*); and (6.) Proceedings in any suit or other matter under 28 & 29 Vict. c. 99, not otherwise provided for, shall be taken or instituted in the county court within the district of which the defendants, or any or either of them, may reside or carry on business (*e*).

We may add that any suit or proceeding pending in the court of chancery, which might have been commenced in a county court, may by order of the judge to whose court it is attached be transferred to that county court in which it might have been originally instituted (*f*).

The foregoing cursory comments upon the jurisdiction *and practice of the county court will, for the purposes of this volume of our [*464] Commentaries, suffice. The powers of this tribunal have thus far been gradually extended and amplified by piecemeal legislation; their actual condition being unsatisfactory (*g*), and such as cannot reasonably be expected to endure. The policy of recent parliaments has in the main been similar to that of our ancient constitution, as regulated and established by the Anglo-Saxons, whose endeavour was to bring justice home to every man's door, by constituting as many courts of judicature as there were manors and townships in the kingdom, wherein injuries might be redressed in an easy and expeditious manner, by the suffrage of neighbours and friends. The *little courts thus constituted in early times, communicated with others of larger juris- [*465] diction, and those with others of a still greater power; ascending gradually from the lowest to the supreme courts, which were respectively constituted to correct the errors of the inferior ones, and to determine such causes as demanded by reason of their weight and difficulty a solemn discussion. The course of justice flowing in large streams from the crown, as its fountain, to the superior courts of record; and being then subdivided into smaller channels,

(*b*) *Ib.*

(*c*) *Ib.*

(*d*) *Ib.*

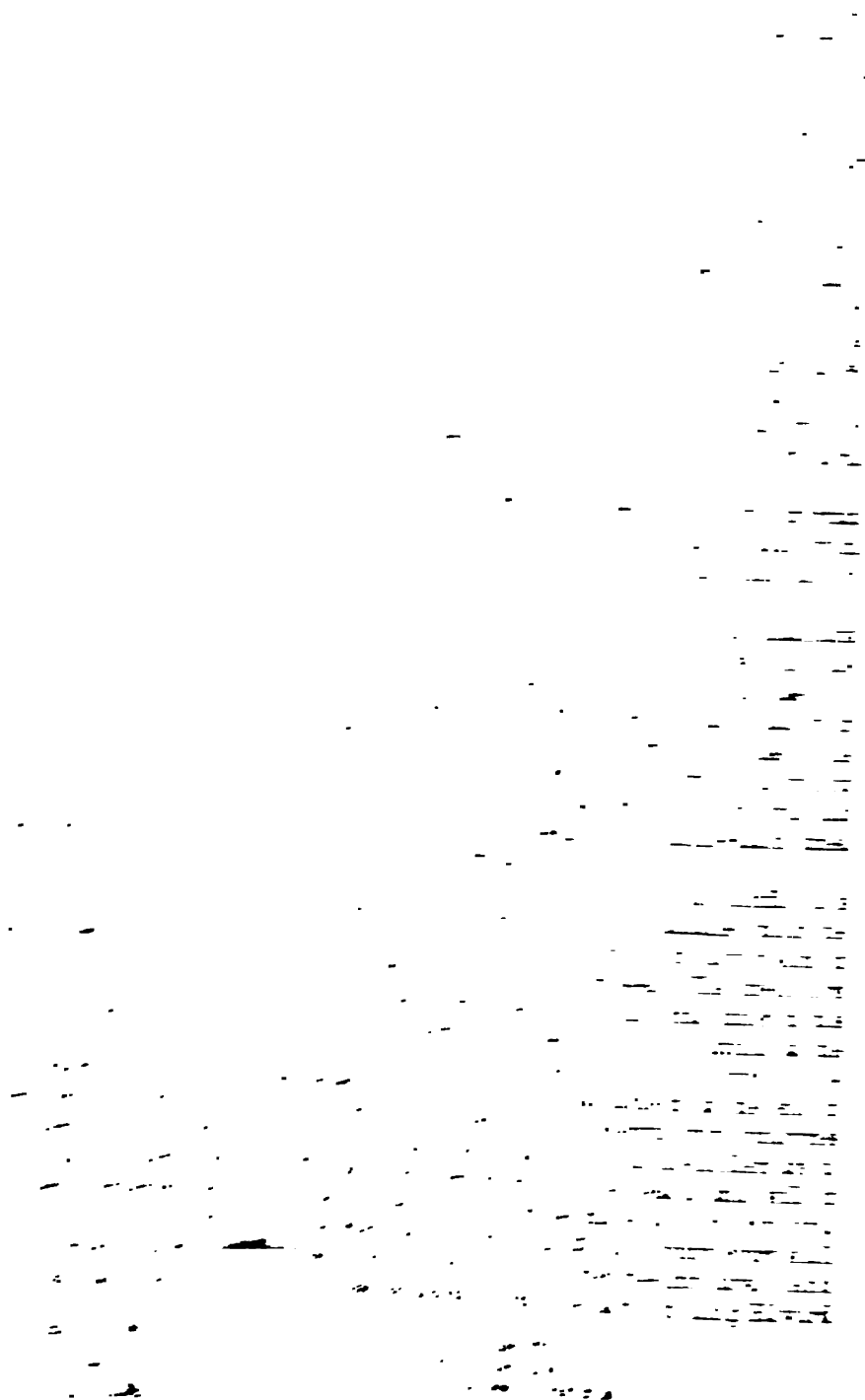
(*e*) *Ib.*

(*f*) 30 & 31 Vict. c. 142, s. 8.

(*g*) The Judicature Commissioners, in their first Report, 1869, p. 8, observe, that the present state of the county courts may be appropriately referred to as exhibiting the strange working of a system of separate jurisdictions, even when exercised by the same court.

The county court (they remark) has jurisdiction in common law cases, up to 50*l.* in contracts, and to 10*l.* in torts. It has also equitable jurisdiction in certain cases when the value of the property in dispute does not exceed 500*l.*, and in at least one of such cases, namely, an administration suit, it is now competent for any county court judge to restrain the prosecution of actions brought by creditors in any of the superior courts of common law. By stat. 31 & 32 Vict. c. 71 (amended by 32 & 33 Vict. c. 51) some of the county courts have also been invested with admiralty jurisdiction in a large class of

cases, where the amount in dispute does not exceed, in some cases 150*l.*, and in others 300*l.* There is an appeal in each class of cases, within certain limits, to a court of common law, to the court of chancery, or to the court of admiralty. But these jurisdictions, though conferred on the same court and the same judge, still remain quite distinct and separate. The judge has no power to administer in one and the same suit any combination of the different remedies which belong to his three jurisdictions, however convenient or appropriate such redress may be. That can only be accomplished, under the county court system, by three distinct suits brought in the same court and before the same judge, carried on under three different forms of procedure, and controlled by three different courts of appeal. In this case, therefore, although we appear at first sight to have obtained that great desideratum, the consolidation of all the elements of a complete remedy in the same court, yet, as that remedy can only be had in three separate suits, the evil is equally great.



* the elder (o) "*præpositus*" (that is, the sheriff) "*ad quartam circiter septimanam frequentem populi concionem celebrato: cuique jus dicito; litesque singulas dirimito.*" In those times the county court was a court of great dignity and splendour, the bishop and the ealdorman (or earl) with the principal men of the shire sitting therein to administer justice both in lay and ecclesiastical causes (p). But its dignity was much impaired, when the bishop was prohibited and the earl neglected to attend it (q). And the county court here treated of was at length deprived of its civil jurisdiction by the 9 & 10 Vict. c. 95.

The forest courts, although still existing, claim our attention by reason of their ancient rather than of their actual importance. We shall first notice them historically, and then briefly indicate the jurisdiction and powers which survive to them.

Forest court.
The forest courts (r) were instituted for the government of the king's forests in different parts of the kingdom, and for the punishment of injuries done to the king's deer or venison, to the vert of greensward, and to the covert in which such deer are lodged. They included the courts of attachments, of regard, of sweinmote, and of justice-seat. The court of attachments, woodmote, or forty days' court, was to be held before the verderors of the forest once in every forty days (s); and was instituted to inquire concerning offenders against vert and venison (t); who might be attached by their bodies, if taken with the mainour (or *mainœuvre*, a *manu*), that is, in the very act of killing venison, or stealing wood, or preparing so to do, or by fresh and immediate pursuit after the act had been done (u); else they were attached by their goods. In *this forty days' court the foresters or keepers were to bring in their attachments, or presentments *de viridi et venatione*; [*468] and the verderors were to receive the same, to enrol them, and to certify them under their seals to the court of justice-seat, or sweinmote (v): for this court could only inquire of, but not convict, offenders. 2. The court of regard, or survey of dogs, was held every third year for the lawing or expeditation of mastiffs, which was done by cutting off the claws and ball (or pelote) of the fore-feet, to prevent them from running after deer (x). No other dogs but mastiffs were to be thus lawed or expeditated, for none others were permitted to be kept within the precincts of the forest, it being supposed that the keeping of these, and these only, was necessary for the defence of a man's house (y). 3. The court of sweinmote was held before the verderors, as judges, by the steward of the sweinmote thrice in every year (z), the sweins or freeholders within the forest composing the jury. The principal jurisdiction of this court was, first, to inquire into the oppressions and grievances committed by the officers of the forest; "*de super-onatione forestariorum, et aliorum ministrorum forestæ; et de eorum oppressionibus populo regis illatis*;" and, secondly, to receive and try presentments certified from the court of attachment against offences in vert and venison (a). And this court might not only inquire, but

(o) C. 11.

(p) Leg. Edgar. c. 5.

(q) F. N. B. 70; Finch. 448.

(r) Ample historical details as to these courts and their jurisdictions are collected in the Report of the Royal New and Waltham Forests Commission, A. D. 1850, pp. 36-39, 52.

(s) Cart de Forest, 9 Hen. 3, c. 8.

(t) 4 Inst. 289.

(u) Carth. 79.

(v) Cart. de Forest. c. 16.

(x) Ib. c. 6.

(y) 4 Inst. 308.

(z) Cart. de Forest. c. 8.

(a) Stat. 34 Edw. 1, c. 1.

convict also, any conviction thus had being certified to the court of justice-seat under the seals of the jury, for this court could not proceed to judgment (*b*). But the principal court was:—4. The court of justice-seat, which was held before the chief justice in eyre, or chief itinerant judge, *capitalis justitiarius in itinere*, or his deputy, to hear and determine all trespasses within the forest, and all claims of franchises, liberties, and privileges, and all pleas and causes [*469] whatsoever therein arising (*c*). It might *also proceed to try presentments in the inferior courts of the forests, and to give judgment upon conviction of the sweinmote. And the chief justice might therefore after presentment made, or indictment found, but not before (*d*), issue his warrant to the officers of the forest to apprehend the offenders. It might be held every third year; and forty days' notice was to be given of its sitting. This court might fine and imprison for offences within the forest (*e*), it being a court of record: and therefore a writ of error lay from thence to the court of king's bench, to rectify and redress any mal-administration of justice (*f*); or the chief justice in eyre might adjourn any matter of law into the court of king's bench (*g*). These justices in eyre were instituted by king Henry II., A. D. 1184 (*h*); and their courts were formerly very regularly held; but the last court of justice-seat of any note was that holden in the reign of Charles I., before the earl of Holland; the rigorous proceedings at which are reported by sir William Jones. After the restoration another was held, *pro forma* only, before the earl of Oxford (*i*); but since the era of the Revolution in 1688, the forest laws fell much into disuse, to the great advantage of the subject. They are, however, administered in a mitigated form, and within very restricted geographical limits at the present day.

There are, indeed, now only three royal forests existing in England, *viz.*, the New Forest, Dean Forest, and that part of Waltham Forest called Epping Forest—all the other crown forests having been disafforested (*k*).

The only court now held in the New Forest is practically (*l*) the court of [*470] attachments held every forty days—* of which court the verderors, elected by the freeholders of the county, are the judges. The course of procedure observed there is briefly this. The presentment of an offence is made by the keeper of the walk in which it occurred at one court and is heard at the next ensuing court, one verderor being competent to receive the presentment, though two verderors are present at the hearing of the case (*m*).

The court of attachments deals with wrongful inclosures, purprestures, encroachments, or trespasses (*n*); breaking down inclosures, burning heath or fern, destroying the covert, or stealing the wood of the forest (*o*). It deals also with offences in depasturing cattle, horses, or other beasts at improper times by those who have common of pasture at certain seasons within the boundaries of the forest; and it also has cognisance of the depasturing of beasts

(*b*) 4 Inst. 289.

(*c*) *Ib.* 291.

(*d*) Stat. 1 Edw. 3, c. 8; 7 Ric. 3, c. 4.

(*e*) 4 Inst. 313.

(*f*) *Ib.* 297.

(*g*) *Ib.* 295.

(*h*) Hoveden.

(*i*) North's Life of Lord Guildford, 45.

(*k*) See vol. i. p. 344.

(*l*) In the month of September, every year,

a court of sweinmote is held, but it differs in name only from the court of attachments.

(*m*) One or more of the regarders of the forest also usually attend the court, but do not take any part in the proceedings. They ought to present any offence that may come to their knowledge. The regarders are elected by the freeholders of the county.

(*n*) See 10 Geo. 4, c. 50, s. 100.

(*o*) See 9 & 10 Will. 3, c. 36.

at any season by those who have not common of pasture (*p*), and of the misconduct of regarders or other officers of the forest (*q*). For such misdoings pecuniary penalties may be inflicted by the court.

The verderors also fine persons having rights of turbary for taking turf from pasture land instead of from the heath ground, and for cutting the turves in an improper manner and contrary to the forest rule. Persons charged with damaging trees or with poaching being generally sent before the magistrates (*r*).

Besides the above courts some others deserve to be * noticed by [* 471] reason of their antiquity, or as possessing jurisdiction of more or less

Other courts. local importance; amongst them may, in the first place, be specified the courts of the counties palatine of Durham and Lancaster (*s*); and the stannary court in Devonshire and Cornwall,

Stannary court. for the administration of justice among the miners there, which is a court of record of a special nature, exercising a jurisdiction in part equitable and in part legal, and not superseded by that of the county court (*u*). The stannary courts were originally held, in virtue of a privilege granted to the workers in the tin mines, in the counties named to sue and be sued only in their own courts, that they might not be drawn from their business by having to attend law suits in other courts (*x*). The privileges of the tinnners were confirmed by a charter, 33 Edw. 1., and fully expounded by a private statute (*y*) 50 Edw. 3., which was subsequently explained by a public act, 16 Car. 1, c. 15. The effect of these, so far as relates to our present purpose, was: that all tinnners and labourers in and about the stannaries should, during the time of their working therein *bond fide*, be privileged from suits of other courts, and be only impleaded in the stannary court in all matters, excepting pleas of land, life, and member.

In each of the stannaries of Cornwall there was formerly a court called the steward's court, in which he exercised a common law jurisdiction, and the vice-warden of the stannaries exercised in his court an original equitable jurisdiction (*z*). These jurisdictions were confined to cases wherein tin or tinnners were concerned, and did not extend to matters relating to lead, copper, or other metals, which in modern times have been * discovered in the [* 472] county. By various statutes, however, below cited (*a*), the jurisdiction of the stannary court has been amplified, and the procedure in it has been revised. The stannaries of Cornwall and Devon now form one entire district. The vice-warden has jurisdiction in actions of contract or tort to the extent of 50*l.*, and his equitable jurisdiction extends to cases arising with respect to the operations of any mine worked for lead, copper, or any metallic mineral, as

(*p*) See 59 Geo. 3, c. 86, ss. 1-4.

(*q*) 59 Geo. 3, c. 86, s. 6.

(*r*) In Dean Forest the court of attachments, composed of the verderors, is still held every forty days, with a jurisdiction in regard to trespassers similar to that above set forth, and power to inflict fines not exceeding 20*l.* in amount. It also has some criminal jurisdiction.

In Waltham Forest courts have not been held for some years; they could however at any time be revived.

(*s*) As to which see vol. i. p. 142.

(*t*) From the Latin, *stannum*, tin.

(*u*) 9 & 10 Vict. c. 95, s. 141 (as to the precise effect of which see *Newton v. Nancarrow*, 15 Q. B. 144); 18 & 19 Vict. c. 32, s. 17.

(*x*) 4 Inst. 232.

(*y*) See this at length in 4 Inst. 232.

(*z*) As to the former equitable jurisdiction of the court, see, however, Bainbridge's *Law of Mines*, 3rd ed. 696.

(*a*) 6 & 7 Will. 4, c. 106; 2 & 3 Vict. c. 58; 11 & 12 Vict. c. 83; 18 & 19 Vict. c. 32; 32 & 33 Vict. c. 19, which amends the law relating to mining partnerships within the stannaries and to the court of the vice-warden.

fully as with respect to tin or tin-mines (*b*). It extends also to non-metallic minerals found in the same mine and worked by the same adventurers (*c*). From the decisions of the vice-warden, both in equity and at common law, an appeal lies to the lord warden, assisted by two or more members of the judicial committee of the privy council, or judges of equity, or courts of law at Westminster; and every judgment of the lord warden is subject to an appeal to the house of lords.

The courts within the city of London (*d*), and other cities and boroughs throughout the kingdom, held by prescription, charter, or act of parliament (*e*), Courts of London, &c. [** 473*] are to be * included in our present list. It would, indeed, exceed the design and compass of our present inquiries, if we were to enter into a particular detail of these local tribunals—to examine the nature and extent of their several jurisdictions, and the mode of procedure observed in them. It must in general suffice to say, that these special jurisdictions arose originally from the favour of the crown to those particular districts, wherein we find them erected, upon the same principle that hundred-courts, and the like, were established; for the convenience of the inhabitants, that they might prosecute their suits, and receive justice at home: that, for the most part, the courts at Westminster Hall have a concurrent jurisdiction with these, or else a superintendency over them: and that the proceedings in these special courts ought to be according to the course of the common law, unless otherwise ordered by parliament; for though the king may erect new courts, yet he cannot alter the established course of the law.

Here, also, may be mentioned the chancellor's courts of the universities of Oxford and Cambridge, which, besides taking cognisance of criminal acts as Courts of the universities. [** 474*] hereafter mentioned (*f*), possess a civil jurisdiction (*g*). The * privilege of Cambridge in this particular has

(*b*) Bainbridge, *Law of Mines*, 3rd ed. 696.

(*c*) *Ib.*

(*d*) These courts are the court of hustings, held before the mayor, recorder, and sheriffs; the Lord Mayor's court, as to which see *Mayor, &c. of London v. Cox*, L. R. 2 H. L. 239, cited *ante*, p. 459, 20 & 21 Vict. c. clvii.; and the City of London court, which is now included in the county courts, 30 & 31 Vict. c. 143, s. 85.

The customs of the city of London are tried or made known in a superior court by the certificate of the mayor and aldermen, certified by the mouth of their recorder. But this rule admits of an exception, where the corporation of London is party, or interested in the suit; for there the reason of the law will not endure so partial a trial; and such a custom is to be determined by a jury, and not by the mayor and aldermen, certifying by the mouth of their recorder. Co. Litt. 74; Bro. Abr. tit. Trial, pl. 96; Hob. 85.

(*e*) See, as to inferior courts of record, 1 & 2 Vict. c. 110, s. 22.

By the 15 & 16 Vict. c. 54, s. 7, the jurisdiction of any local court having concurrent jurisdiction with a county court, may, on petition to the queen in council, "be excluded in any causes whereof the county court hath cognisance."

(*f*) Vol. iv. p. 361.

(*g*) Which was granted in order that the students might not be distracted from their studies by legal process from distant courts, and other forensic avocations. Privileges of this kind are of very high antiquity, and were generally enjoyed by foreign universities, as well as by our own. (See, for instance, Cod. 4, 13.) In England, the oldest charter containing this grant to the university of Oxford, was 28 Hen. 3, A. D. 1244. And the same privileges were confirmed and enlarged by almost every succeeding prince, down to king Henry VIII.; in the fourteenth year of whose reign the largest and most extensive charter of all was granted. One similar to which was afterwards granted to Cambridge in the third year of queen Elizabeth. But yet, notwithstanding these charters, the privileges granted therein, of proceeding in a course different from the law of the land, were of so high a nature, that they were held to be invalid; for though the king might erect new courts, yet he could not alter the course of law by his letters patent. Therefore, in the reign of queen Elizabeth, an act of parliament was obtained (13 Eliz. c. 29) confirming all the charters of the two universities, and those of 14 Hen. 8 and 3 Eliz. by name, which "blessed act," as sir Edward Coke entitles it (4 Inst. 227), established this high privilege without any doubt or opposi-

been restricted by a recent enactment (*h*), and formerly differed from that of Oxford: extending only to causes of action accruing in the town and its suburbs; whereas the jurisdiction of the chancellor's court at Oxford extended, and still extends, to all personal causes anywhere arising (*i*). The respective jurisdictions of these courts are not affected by the county courts acts (*k*).

The last species of courts to be here mentioned is that of commissioners of sewers. This was formerly a temporary tribunal erected by virtue of a commission under the great seal; which used to be granted *pro re nate* at the pleasure of the crown, but afterwards at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute 23 Hen. 8, c. 5. The jurisdiction of the commissioners being to overlook the repairs of sea banks and sea walls: and the cleansing of rivers, public streams, ditches, and other conduits, whereby any waters are carried off: and being confined to such county or particular district as the commission expressly named. The court of the old commissioners of sewers was a court of record (*l*); and in the * execution of their duty the commissioners might proceed by jury, or upon their own view, and might take order for the removal of annoyances, or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney Marsh (*m*), or otherwise at their own discretion. They were also to assess such rates upon the owners of lands within their district, as they should judge necessary; and if any person refused to pay them, the commissioners were empowered to levy the same by distress of his goods and chattels; or they might by statute 23 Hen. 8, c. 5, sell his freehold lands (and by the 7 Ann. c. 10, his copyhold also) in order to pay such assessments. But their conduct was under the control of the court of king's bench (*n*).

The law relating to sewers was materially improved by the statute 3 & 4 Will. 4, c. 22 (amended by subsequent enactments (*o*)), which contains provisions as to the qualification of the commissioners, their meetings and mode of procedure, the laying of rates, the making of new works, and purchase of land by them for the purposes of the act; the vesting of property in the commissioners, the levying of fines and penalties by them, and other matters. The statute 24 & 25 Vict. c. 133, also empowers the crown on the recommendation of the inclosure commissioners to issue commissions of sewers

tion; or, as sir Matthew Hale observes (Hist. C. L. 38), "Although king Henry the Eighth, 14 *anno regni sui*, granted to the university a liberal charter, to proceed according to the use of the university, *vis.*, by a course much conformed to the civil law, yet that charter had not been sufficient to have warranted such proceedings without the help of an act of parliament. And therefore in 18 Eliz. an act passed, whereby that charter was in effect enacted; and it is thereby that at this day they have a kind of civil procedure, even in matters that are of themselves of common law cognisance, where either of the parties is privileged."

(*h*) 19 & 20 Vict. c. xvii.

(*i*) The privilege of the university of Oxford is fully stated in *Re The Chancellor, &c. of the University of Oxford and John Taylor*, 1 Q. B. 952.

(*k*) 9 & 10 Vict. c. 95, s. 140.

(*l*) *Vide per* Willes, J., 19 C. B. N. S. 497.

(*m*) A tract of land in the county of Kent, containing 24,000 acres, governed by certain ancient and equitable laws of sewers, composed by Henry de Bathe, a judge, *temp.* king Henry III. 4 Inst. 276.

(*n*) *Hetley v. Boyer*, Cro. Jac. 336.

And yet in the reign of king James I. (A. D. 1616) the privy council took upon them to order that no action or complaint should be prosecuted against the commissioners, unless before that board: and committed several persons to prison who had brought such actions at common law, till they should release the same; and one of the reasons for discharging sir Edward Coke from his office of lord chief justice may have been for countenancing those actions. Moor, 825, 826.

(*o*) Of which may be specified 4 & 5 Vict. c. 45; 12 & 13 Vict. c. 50; 24 & 25 Vict. c. 133.

[*476] * for new areas in all parts of England, inland as well as maritime, with power not merely to maintain existing but to erect new works (*p*).

In reference generally to courts, such as above noticed, of limited and special jurisdiction, an observation of sir Edward Coke (*q*) may properly be cited — that these particular jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever strictly restrained, and cannot be extended further than the express letter of their privileges will most explicitly warrant.

(*p*) See particularly ss. 4, *et seq.*

(*q*) 2 Inst. 548.

BOOK THE FOURTH.

PUBLIC WRONGS.

* CHAPTER I.

[*1]

THE NATURE OF CRIME; AND PUNISHMENT.

WE are now arrived at the fourth and last branch of these Commentaries; which treats of public wrongs, or crimes. For we may remember that, in the beginning of the preceding volume (*a*), wrongs were divided into two species: the one private, and the other public. Private wrongs, which are frequently termed civil injuries, were in part the subject of that book: we are now therefore, lastly, to proceed to the consideration of public wrongs, or crimes; with the means of their prevention and punishment. In the pursuit of which subject I shall consider, in the first place, the general nature of crimes and punishments; secondly, the persons capable of committing crimes; thirdly, their several degrees of guilt, as * principals, or accessories; fourthly, the several species of crimes, with the punishment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and, sixthly, the method of inflicting those punishments, which the law has annexed to each several offence. [* 2]

First, as to the general nature of crime and punishment; the discussion and admeasurement of which forms in every country the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the "pleas of the crown;" so called, because the sovereign, in whom centres the majesty of the whole community, is supposed by law to be the person injured by an infraction of the public rights belonging to that community, and is therefore the proper prosecutor for a public offence (*b*).

The knowledge of this branch of jurisprudence, which teaches the nature, extent, and degree of every crime, and adjusts to it its adequate and necessary penalty, is of the utmost importance to every individual in the state. For (as a great master of the crown law (*c*) has observed) no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not at some time or other, be deeply interested in these researches. The

(*a*) Book III. ch. 1.
(*b*) *Ante*, vol. I. p. 820.

(*c*) Sir Michael Foster, Pref. to Rep.

infirmities of the best among us, the vices and ungovernable passions of others, the instability of human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

In proportion to the importance of the criminal law ought also to be the care and attention of the legislature in properly forming and enforcing it. It should be founded * upon principles that are permanent, uniform, and universal; and should be always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind; though it sometimes (provided there be no transgression of these eternal boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern. And yet, either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition, and revenge; from retaining the discordant political regulations, which successive conquerors or factions have established, in the various revolutions of government; from giving a lasting efficacy to sanctions that were intended to be temporary, and made (as Lord Bacon expresses it) merely upon the spur of the occasion; or from, lastly, too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some very prevalent offence: from some, or from all, of these causes, it has happened, that the criminal law throughout the countries of Europe and in our own has until recently been more rude and imperfect than the civil.

I proceed now to consider (in the first place) the general nature of crime.

I. A crime is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition, which will in future chapters be rendered more precise, comprehends both crimes which are indictable, and offences which are summarily punishable.

L. Nature of crime in general

The distinction of public wrongs from private, of crimes from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals: public wrongs, or crimes, are a breach and violation of the public rights and

Distinction between public and private wrongs.

* duties, due to the whole community, considered as a community, in its social aggregate capacity. If I detain a field from another man, to which the law has given him a right, this is a civil injury, not a crime; for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land: but treason, murder, and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike at the very being of society, which cannot possibly subsist, where actions of this sort are suffered to escape with impunity. (606)

(606) In most of the States the common law is held to extend as well to criminal cases as to civil. See *State v. Boese*, 8 Rich. (S. C.) 276; *State v. Danforth*, 3 Conn. 112; *State v. Troogood*, 7 Iowa, 252; *Smith v. People*, 25 Ill. 17; *Barlow v. Lambert*, 28 Ala. 704;

In nearly every case a crime includes an injury; almost every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community. Thus treason in imagining the sovereign's death involves in it conspiracy against an individual, which is also a civil injury; but, as this species of treason in its consequences principally tends to the dissolution of government, and the destruction thereby of the order and peace of society, it must be regarded as a crime of the highest magnitude. Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set for others to do the like. Robbery may be considered in the same view: it is an injury to private property; but were that all, a civil satisfaction in damages might be allowed to atone for it: the public mischief is the thing, for the prevention of which our laws have made this offence severely punishable. In any such gross and atrocious injury the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual; the satisfaction to the community being so very great. And indeed, as the public crime is not otherwise avenged than by forfeiture of life or liberty and property, it is in general impossible afterwards that any reparation can be made for the private *wrong: for this can only be had from the body or [* 5] goods of the aggressor. (607) But there are crimes of an inferior nature, in which the public punishment is not so severe but it affords room for a private compensation also; and herein the distinction of crimes from civil injuries is very apparent. For instance; in the case of battery, or beating another, the aggressor may be indicted for this at suit of the crown, for disturbing the public peace, and be punished criminally by fine and imprisonment; and the party beaten may also have his private remedy by action for the injury which he in particular sustains, and may recover a civil satisfaction in damages. (608) So also, in case of a public nuisance, as digging a ditch

State v. Rollins, 8 N. H. 550; *Com. v. Newell*, 7 Mass. 245; *State v. Odum*, 11 Texas, 12. But it has been decided otherwise in Ohio. See *Allen v. State*, 10 Ohio St. 287; *Smith v. State*, 12 id. 466; *Key v. Vattier*, 1 Ohio, 132. And in Indiana criminal offenses are defined and punished solely by statute. See *Jennings v. State*, 16 Ind. 335; *Beal v. State*, 15 id. 378; *Marvin v. State*, 19 id. 181; *Hackney v. State*, 8 id. 494.

(607) The doctrine of the English law, that in felony no action lies against the felon, before the institution of criminal proceedings against him, is not in force in the United States. In some of the States where the rule had been established by decisions of the courts it has been abolished by legislative enactments. See N. Y. Code, § 7; Stat. of Maine, 1844, chap. 102. Prosecutions for offenses against the State are, in this country, conducted by officers selected for the purpose; and parties injured by a felony may demand and recover compensation for the private injury inflicted, without awaiting the result of such action as the public prosecutor may see proper to institute. *Boston & Worcester R. R. Corp. v. Dana*, 1 Gray (Mass.), 83, 100; *Story v. Hammond*, 4 Ohio, 376; *Pettingill v. Rideout*, 6 N. H. 454; *Blasingame v. Graves*, 6 B. Monroe (Ky.), 88; *Cross v. Guthery*, 2 Root (Conn.), 90; *Gordon v. Hostetter*, 37 N. Y. (10 Tiff.) 99, 105. See *Newton v. Porter*, 5 Lans. 416, 432.

It is illegal, however, in a private individual to suppress a prosecution for a crime, or the evidence necessary to support such a prosecution. *Plumer v. Smith*, 5 N. H. 553.

(608) The prosecutor, in an indictment for an assault and battery, has a right to proceed both criminally and civilly, and he will not be compelled to make his election upon which he will rely. *Buckner v. Beck*, Dudley (S. C.), 168; *State v. Frost*, 1 Brev. (S. C.) 385. But

across a highway, this is punishable by indictment, as a common offence to the whole kingdom and to all her majesty's subjects; but if any individual sustains any special damage thereby, his horse being lamed, his carriage broken, or the like, the offender may be compelled to make ample satisfaction, as well for the private injury as for the public wrong.

Upon the whole we may observe, that in taking cognisance of wrongs, or unlawful acts, the law has a double view: viz. not only to redress the party injured, by either restoring to him his right, if possible; or by giving him an equivalent; the manner of doing which was the object of our inquiries in the preceding book of these Commentaries; but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish for the government and tranquillity of the whole. What those breaches are, and how prevented or punished, is to be considered in the present book.

II. The nature of crime in general being thus ascertained and distinguished, I proceed in the next place, to consider the general nature of punishment: which is an *evil or inconvenience consequent upon crime; being devised, denounced, and inflicted by human laws, in consequence of disobedience or misbehaviour in those, to regulate whose conduct such laws were respectively made. And herein we will briefly consider the power, the end, and the measure of human punishment.

1. As to the power of human punishment, or the right of the temporal legislator to inflict discretionary penalties for crimes (*d*). It is clear that the right of punishing crimes against the law of nature, as murder and the like, is in a state of mere nature vested in every individual. It must be vested in somebody; otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution: and if that power is vested in any one, it must also be vested in all mankind; since all are by nature equal. Whereof the first murderer Cain was so sensible, that we find him (*e*), expressing his apprehensions, that whoever should find him would slay him. In a state of society this right is transferred from individuals to the sovereign power; whereby men are prevented from being judges in their own causes; which is one of the evils that civil government was intended to remedy. Whatever power therefore individuals had of punishing offences against the law of nature, that power is now vested in the magistrate alone; who bears the sword of justice by consent of the whole community.

As to offences merely against the laws of society, being only *mala prohibita*, and not *mala in se*; the temporal magistrate is also empowered to inflict coercive penalties for such transgressions: and this by the consent of individuals; who, in forming societies, did either tacitly or expressly invest the

(*d*) See Grotius, de J. B. & P. l. 2, c. 20. (e) Gen. iv. 14.
Puffendorf, L. of Nat. and N. b. 8, c. 8.

see *State v. Blyth*, 1 Bay (S. C.), 186. And proceedings on the indictment will not be stayed because a civil suit is pending to recover damages for the same assault and battery. *Commonwealth v. Elliott*, 2 Mass. 373; *People v. Judges, etc., of Genesee*, 18 Johns. 85.

The act of an individual in abating a public nuisance does not bar him of an action for damages. The abatement is preventive merely. *Pierce v. Dart*, 7 Cow. 609.

sovereign power with the right of making laws, and of enforcing obedience to them when made, by exercising, upon their non-observance, severities adequate to the evil. The lawfulness therefore * of punishing such criminals is [* 7] founded upon this principle, that the law by which they suffer was made by their own consent; it is a part of the original contract (f) into which they entered, when first they engaged in society; it was calculated for, and has long contributed to, their own security.

This right, therefore, being thus conferred by universal consent, gives to the state exactly the same power, over all its members, as each individual member had naturally over himself or others.

2. As to the end or final cause of human punishment. This is not by way of atonement or expiation for the crime committed: for that must be left to a. The object of punishment. the just determination of the Supreme Being: but as a precaution against future offences of the same kind. This may be effected three ways: either by the amendment of the offender himself, or, by deterring others by the dread of his example from offending in the like way, "*ut pœna ad paucos, metus ad omnes, perveniat*;" (g) or, lastly, by depriving the party injuring of the power to do future mischief, either permanently or for a season. The same one end, of preventing future crimes, is thus endeavoured to be answered. The public gains equal security, whether the offender himself be amended by wholesome correction, or whether he be disabled from doing any further harm; and if the penalty fails in producing both these effects, as it may do, still the terror of his example remains as a warning to other citizens. The method however of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it.

3. As to the measure of human punishments. From what has been observed in the former articles we may collect, that the quantity of punishment can never be absolutely determined by any standing invariable rule; but it must be left to the arbitration of the legislature to * inflict such [* 8] 2. The measure or degree of punishment. penalties as are warranted by the laws of nature and society, and such as appear to be best calculated to answer the end of precaution against future offences.

Hence it will be evident, that what some have so highly extolled for its equity, the *lex talionis*, or law of retaliation, cannot be a fit or adequate rule of punishment. It is unequal in its operation; for a difference of person, place, time, provocation, or other circumstance, may enhance or mitigate the offence; and if so, retaliation cannot be a proper measure of justice. If a man maliciously should put out the remaining eye of him who had lost one before, it is too slight a punishment for the maimer to lose only one of his: and therefore the law of the Locrians, which demanded an eye for an eye, was in this instance judiciously altered by decreeing, in imitation of Solon's laws (h), that he who struck out the eye of a one-eyed man, should lose both his own in return. Besides, there are very many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like. And we may add, that those instances, wherein retali-

(f) *Ante*, vol. i. p. 41.
(g) *Cic. Pro Cluentio*, 46.

(h) *Pott. Ant. b. 1, c. 26.*

ation appears to be used, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the same hurt he has done to his neighbour, and no more: but this correspondence between the crime and punishment is barely a consequence from some other principle. Death is ordered to be punished with death, not because one is equivalent to the other, for that would be expiation, and not punishment. Nor is death always an equivalent for death; the execution of a needy decrepit assassin is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours, and his fortune. But the reason [* 9] upon which * this sentence is grounded seems to be, that this is the highest penalty that man can inflict, and tends most to the security of mankind; by removing one murderer from the earth, and setting a dreadful example to deter others; so that even this grand instance proceeds upon other principles than those of retaliation. And truly, if any measure of punishment is to be taken from the damage sustained by the sufferer, the punishment ought rather to exceed than equal the injury: since it seems contrary to reason and equity, that the guilty (if convicted) should suffer no more than the innocent has done before him; especially as the suffering of the innocent is past and irrevocable, that of the guilty is future, contingent, and liable to be escaped or evaded. With regard indeed to crimes that are incomplete, which consist merely in the intention, and are not yet carried into act, as conspiracies and the like; the innocent has a chance to frustrate or avoid the villany, as the conspirator has also a chance to escape his punishment: and this may be one reason why the *lex talionis* is more proper to be inflicted, if at all, for crimes that consist in intention, than for such as are carried into act. It seems indeed consonant to natural reason, and has therefore been adopted as a maxim by several theoretical writers (i), that the punishment due to the crime of which one falsely accuses another, should be inflicted on the perjured informer. Accordingly, when it was once attempted to introduce into England the law of retaliation, it was intended as a punishment for such only as preferred malicious accusations against others; it being enacted by statute 37 Edw. 3, c. 18, that such as preferred any suggestions to the king's great council should put in sureties of taliation; that is, to incur the same pain that the other should have had, in case the suggestion were found untrue. But, after one year's experience, this punishment of taliation was rejected, and imprisonment adopted in its stead (k).

[* 10] * But though from what has been said it appears, that there cannot be any regular or determinate method of rating the quantity of punishment for crime, by any one uniform rule; that it must be referred to the will and discretion of the legislative power: yet there are some general principles, drawn from the nature and circumstances of a crime, that may be of some assistance in allotting to it an adequate punishment.

As, first, with regard to the object of it: for the greater and more exalted the object of an injury is, the more care should be taken to prevent that injury, and of course under this aggravation the punishment should be more severe. Therefore treason in compassing and conspiring the death of the sovereign is by the English law punished with greater rigour than even actually killing any private subject. And yet, generally, a design to transgress is not so flagrant

(i) Beccar. c. 15.

(k) Stat. 39 Edw. 3, c. 9.

an enormity, as the actual completion of that design. For evil, the nearer we approach it, is the more disagreeable and shocking: so that it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it: and it is an encouragement to repentance and remorse, even till the last stage of any crime, that it never is too late to retract; and that if a man stops even here, it is better for him than if he proceeds: for which reason an attempt to rob, to ravish, or to kill, is less penal than the actual robbery, rape, or murder. But in the case of a treasonable conspiracy, the object whereof is the king's majesty, the bare intention will deserve the highest degree of severity; not because the intention is equivalent to the act itself: but because the greatest rigour is no more than adequate to a treasonable purpose of the heart manifested by some overt act, and there is no greater left to inflict upon the actual execution of the deed.

Again: the violence of passion may sometimes alleviate a crime. To kill a man upon sudden and violent resentment, is less penal than upon cool deliberate malice. The *age, education, and character of the offender; [* 11] the repetition (or otherwise) of the offence; the time, the place, the company wherein it was committed; all these, and a thousand other incidents, may aggravate or extenuate a crime (l).

Further: as punishment is chiefly intended for the prevention of future crime, it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness (m); and, among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which therefore the offender has the strongest inducement to commit: according to what Cicero observes (n), "*ea sunt animadvertenda peccata maxime, quæ difficillime præcaventur.*" Hence it is, that larceny by a servant is more severely punishable than by a stranger. And, in the island of Man, the rule adverted to was formerly carried so far, that to take away a horse or an ox was there no felony, but a trespass, because of the difficulty in that little territory to conceal them, or carry them off; but to steal a pig or a fowl, which is easily done, was a capital misdemeanor, and the offender was punished with death (o).

Lastly: as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly *intermixed with due distinctions of severity. It is the sentiment [* 12] of an ingenious writer, who seems to have well studied the springs of human action (p), that crimes are more effectually prevented by the certainty, than by the severity of punishment. For the excessive severity of laws (says Montesquieu (q)) hinders their execution; when the punishment surpasses all measure, the public will frequently out of humanity prefer impunity to it. Thus also the statute 1 Mar. st. 1, c. 1, recites in its preamble, "that the

(l) Thus Demosthenes (in his oration against Midias) finely works up the aggravations of the insult he had received. "I was abused," says he, "by my enemy, in cold blood, out of malice, not by heat of wine, in the morning, publicly, before strangers as

well as citizens; and that in the temple, whither the duty of my office called me."

(m) Beccar. c. 6.

(n) Pro Sexto Roscio, 40.

(o) 4 Inst. 285.

(p) Beccar. c. 7.

(q) Sp. L. b. 6, c. 13.

state of every king consists more assuredly in the love of the subject towards their prince, than in the dread of laws made with rigorous pains; and that laws made for the preservation of the commonwealth without great penalties are more often obeyed and kept, than laws made with extreme punishments" (r). Happy had it been for the nation, if the subsequent practice of that deluded princess in matters of religion, had been correspondent to these sentiments of herself and parliament, in matters of state and government! We may further observe that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the

[* 13] twelve * tables of the *decemviri*, were full of cruel punishments: the Porcian law, which exempted all citizens from sentence of death, silently abrogated them. In this period the republic flourished: under the emperors severe punishments were revived; and then the empire fell.

It is moreover absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect either in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much easier to extirpate them than to amend mankind; yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb which through ignorance or indolence he will not attempt to cure. It has been therefore ingeniously proposed (s), that in every state a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least: but, if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions of offences, and leave to judicial discretion within certain indicated limits the task of meting out their punishment.

The inflicting of capital punishment, now of comparatively rare occurrence, has been thus justified by that great and good man, sir Matthew Hale (t): "When offences grow enormous, frequent, and dangerous to a kingdom or state, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom or its inhabitants, severe punishment, and even death itself, is necessary to be annexed to laws in many cases by the prudence of lawgivers." It is therefore the enormity, or dangerous tendency, of [* 14] the crime that alone * can warrant any earthly legislature in putting him to death who commits it. It is not its frequency only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For, though the end of punish-

(r) So the statute 1 Edw. 6. c. 12, sets forth in its preamble that "Nothing is more godly, more sure, more to be wished and desired betwixt a prince, the supreme head and ruler, and the subjects whose governor and head he is, than on the prince's part great clemency and indulgency, and rather too much forgiveness and remission of his royal power and just punishment, than exact severity and justice to be shewed; and on the subjects' behalf, that they should obey rather for love, and for the necessity and love of a king and prince than for fear of his strait and severe laws." It therefore repeals every statute

which had created any treason since the 25 Edw. 3, st. 5, c. 2. It repeals "all and every Act of Parliament concerning doctrine or matters of religion." It repeals every felony created by the legislature, during the preceding reign of Henry VIII. It likewise repeals the statute 31 Hen. 8, enacting "that proclamations made by the king's highness, by the advice of his honorable council, should be made and kept as though they were made by authority of parliament."

(s) Beccar. c. 6.

(t) 1 P. C. 18.

ment is to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws. Every humane legislator will be therefore extremely cautious of establishing laws that inflict the penalty of death, especially for slight offences, or such as are merely positive. To shed the blood of our fellow-creature is a matter that requires the greatest deliberation and the fullest conviction of our own authority: for life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of him who gave it: either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration.

* CHAPTER II.

[*15]

THE PERSONS CAPABLE OF COMMITTING CRIMES.

HAVING, in the preceding chapter, considered in general the nature of crime, and punishment, we are next led, in the order of our distribution, to inquire what persons are, or are not, capable of committing crimes; who are exempted from the censures of the law upon the commission of acts, which in other persons would be severely punished. In the process of this inquiry, we must have recourse to particular and special exceptions: for the general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

We have seen that a criminal act is one which affects prejudicially the public; it must also (subject to some few and peculiar exceptions) have proceeded from a guilty mind. So that the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may in general be reduced to this single consideration, the want or defect of will. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognisable by human laws, there must be both a will and an act. For though, *in foro conscientiae*, a fixed design or will to do an unlawful act is almost as * heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for that which it cannot know. For which reason in all temporal jurisdictions an overt act, or some open evidence of an intended crime, is necessary in order to demonstrate the depravity of the will, before the accused is liable to punishment. And, as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will may be no crime at all. So that to constitute a crime against human laws, there must in

Persons capable
of committing
crimes.

There must be a
vicious will, and
unlawful act con-
sequent thereon.

[*16]

almost all cases be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

Now there are three cases, in which the will does not join with the act:

1. Where there is a defect of understanding. For where there is no discernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing else but a determination of one's choice to do or to abstain from a particular action:

he, therefore, who has no understanding, can have no will to guide his conduct. 2. Where there is understanding and will sufficient, residing in the party; but not called forth and exerted at the time of the action done; as where an offence is committed by mischance or ignorance. Here the will sits neuter; and neither concurs with the act, nor disagrees to it. 3. Where the action is constrained by some outward force and violence. Here the will counteracts the deed; and is so far from concurring with, that it loathes and disagrees to, what the man is obliged to perform. It will be the business of the present chapter, briefly to consider the several species of defect in will, as they fall under some one or other of these general heads: as infancy, idiocy, lunacy, and intoxication, which fall under the first class; misfortune, and ignorance, which may be referred to the second; and compulsion or necessity, which may properly rank in the third.

- [* 17] * I. First, we will consider the case of infancy, or nonage: during which there is a defect of the understanding. Infants, under the age of discretion, ought not to be punished by any criminal prosecution (a).

I. Infancy.

The age of discretion has, in various nations, varied. The civil law distinguished the age of minors, or males under twenty-five years old, into three stages: *infantia*, from birth till seven years of age; *pueritia*, from seven to fourteen; and *pubertas*, from fourteen upwards (b). The period of *pueritia*, or childhood, was again subdivided into two equal parts: from seven to ten and a half was *ætas infantia proxima*; from ten and a half to fourteen was *ætas pubertati proxima*. During the first stage of infancy and the next half stage of childhood, *infantia proxima*, persons were not punishable for any crime (c). During the other half stage of childhood, approaching to puberty, from ten and a half to fourteen, they were indeed punishable, if found to be *doli capaces*, or capable of mischief; but with many mitigations, and not with the utmost rigour of the law (d). During the last stage (at the age of puberty, and afterwards), minors were liable to be punished, as well capitally as otherwise.

The law of England does in some cases privilege an infant, under the age of twenty-one, as to common misdemeanors, so as to escape fine, imprisonment, and the like: and particularly in cases of omission, as not repairing a bridge (e), or a highway, and other similar offences (f): for not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery, assault (g), or the like (which * infants, when full grown, are at least as likely as others to commit), for these an infant, above

(a) 1 Hawk. P. C. 2.

(b) The period of *pubertas plena* was in males fixed at eighteen years.

(c) Inst. 3, 20, 10.

(d) Dig. 29, 5, 14; 50, 17, 111; 47, 2, 28.

(e) See *R. v. Sutton*, 3 Ad. & E. 597.

(f) 1 Hale, P. C. 20, 21, 22.

(g) *Reg. v. Read*, 1 Den. 377.

the age of fourteen, is equally liable to suffer as a person of the full age of twenty-one.

With regard to capital crimes, the law is still more minute and circumspect; distinguishing with greater nicety the several degrees of age and discretion. By the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open (*h*); and from thence till the offender was fourteen, it was *ætas pubertati proxima*, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious age of discretion: but, under twelve it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he had in fact committed. But by the law, as it now stands, and has stood at least ever since the time of Edward III., the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that "*malitia supplet ætatem*." Under seven years of age, indeed, an infant cannot be guilty of felony (*i*); for then a felonious discretion is almost an impossibility in nature: but at eight years old he may be guilty of felony (*k*). Also, under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax*; yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and punished (*l*). (609) Thus a girl of thirteen has been burnt for killing her mistress: and one boy of ten, and another of nine years old, who had killed their * companions, [* 19] have been sentenced to death, and he of ten years actually hanged; because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil (*m*). And there was an instance in the 17th century where a boy of eight years old was tried at Abingdon for firing two barns; and it appearing that he had malice, revenge,

(*h*) Leg. Athelstan. Wilk. 65.

(*l*) *R. v. Owen*, 4 C. & P. 236.

(*i*) *Mirr. c. 4, s. 16*; 1 Hale, P. C. 27.

(*m*) 1 Hale, P. C. 26, 27.

(*k*) *Dalt. Just. c. 147*.

(609) A child under seven years of age is conclusively presumed incapable of committing any crime whatsoever, and cannot be judicially punished (*People v. Townsend*, 8 Hill, 479); but between the ages of seven and fourteen the presumption of incapacity is only *prima facie*, and evidence showing a criminal capacity may be received. *Godfrey v. The State*, 31 Ala. 323; *The State v. Doherty*, 2 Tenn. 80; *State v. Goin*, 9 Humph. (Tenn.) 175; *State v. Pugh*, 7 Jones (N. C.), 61; *Commonwealth v. Mead*, 10 Allen (Mass.), 398; *State v. Learnard*, 41 Vt. 585; *People v. Randolph*, 2 Park. 174. In New Jersey a boy of twelve years was convicted of murder, sentenced, and executed. *State v. Guild*, 5 Halst. 163. And see *State v. Bostick*, 4 Harr. (Del.) 563; *State v. Aaron*, 1 Southard (N. J.), 231; *Irby v. State*, 32 Ga. 496; *Godfrey v. State*, 31 Ala. 323.

At fourteen criminal responsibility fully attaches to infants; and he who would set up their incapacity must prove it. *State v. Handy*, 4 Harr. (Del.) 566; *State v. Goin*, 9 Humph. (Tenn.) 195; *Irby v. State*, 32 Ga. 496.

An infant under fourteen years is, by law, presumed incapable of committing rape (*Stephen v. State*, 11 Ga. 227); but in Ohio this presumption of incapacity may be overcome by evidence. *Williams v. The State*, 14 Ohio, 222. And see *People v. Randolph*, 2 Park. 174. And an infant under fourteen may be convicted of an assault with intent to commit a rape. *Com. v. Green*, 2 Pick. (Mass.) 380; *State v. Pugh*, 7 Jones (N. C.), 61. But see *People v. Randolph*, 2 Park. 213; *State v. Sam*, Winston (N. C.), 300.

and cunning, he was found guilty, condemned, and hanged accordingly (*n*). Thus also, in more modern times, a boy of ten years old was convicted on his own confession of murdering his bedfellow, there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment, but a pardon was granted by the crown (*o*). In any such case, the evidence of that malice which is to supply age, ought to be strong and clear beyond all doubt and contradiction. (610)

II. The second case of a deficiency in will, which excuses from the guilt of crime, arises from a defective or vitiated understanding, caused by idiocy or lunacy. For the rule of law as to the latter, which may easily be adapted to the former, is, that "*furiosus furore solum puni-
tur.*" In criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities (*p*): no, not even for treason itself (*q*). (611) But the law concerning persons who are *non compos mentis* has sometimes to be applied under * circumstances of much difficulty and nicety; for instance, where there is mental obliquity in

(*n*) Emllyn on 1 Hale, P. C. 25. (p) Per Tracy, J., *R. v. Arnold*, 16 St. Tr.
(*o*) *York's Case*, Foster, 70, 72; *R. v. Wild*, 764.
1 Mood. C. C. 452. (q) 3 Inst. 6.

(610) The capacity to commit crime in such cases must be proved by distinct and substantive evidence. *Com. v. Mead*, 10 Allen (Mass.), 398.

(611) The degree of mental unsoundness that will exempt a person from the punishment of the law, for acts done by him, is a subject that has undergone a great deal of discussion in recent times, both in this country and in England; but for a full statement of the conclusions arrived at, works on medical jurisprudence, insanity, and criminal law, must be consulted.

It would seem to be well settled, that where an individual lacks the capacity to distinguish right from wrong in reference to the particular act complained of, the law will not hold him responsible. *McAllister v. State*, 17 Ala. 434; *State v. Huting*, 21 Mo. 484; *Freeman v. People*, 4 Denio, 20; *Willis v. People*, 32 N. Y. (5 Tiff.) 715; *People v. Sprague*, 2 Park. 43; *Com. v. Heath*, 11 Gray (Mass.), 303; *Anderson v. State*, 42 Ga. 11; *State v. Lawrence*, 57 Me. 574; *People v. Coffman*, 24 Cal. 230; *Com. v. Mosler*, 4 Barr (Penn.), 267; *Flanagan v. The People*, 52 N. Y. (7 Sick.) 467; *People v. Montgomery*, 18 Abb. N. S. 207.

The question to be considered by the jury is, whether, at the time the prisoner committed the act, he was conscious of doing wrong. See *Loeffner v. The State*, 10 Ohio, 593; *Fisher v. People*, 23 Ill. 283; *Bovard v. The State*, 30 Miss. 600; *State v. Windsor*, 5 Harr. (Del.) 512; *The State v. Spencer*, 1 Zab. (N. J.) 196; *Flanagan v. The People*, 52 N. Y. (7 Sick.) 467; *People v. Schryver*, 42 N. Y. (2 Hand) 1. And see the cases cited above.

It is held to be a safe and reasonable test, applicable in all cases, that, whenever it should appear from the evidence that at the time of doing the act the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act; and that he would not have done the act but for that affection, he ought to be acquitted. But this unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them. BREESE, J., *Hopps v. People*, 31 Ill. 385, 391.

reference only to particular subjects, or where the mental capacity, though weak and clouded, is still such as might presumably have availed to restrain from committing crime. As regards the condition of mind first supposed, the opinion of the judges (*r*) in *M'Naghten's Case* (*s*), sanctioned by the House of Lords, must guide us; there certain questions, bearing directly on this subject, were formally proposed to the judges, which, with the answers to them, are below set out:—

1st. "What is the law respecting alleged crimes committed by persons afflicted with insane delusions in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

To which question the answer was as follows—Assuming that the inquiries are confined to persons who labour under such partial delusions only, and are not in other respects insane, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to the law of the land.

2nd. "What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime, and insanity is set up as a defence?" and 3rd. "In what terms ought the question to be left to the jury as to the *prisoner's state of mind when the act [* 21] was committed?"

To these two questions the answer judicially returned was—"The jury ought to be told in all cases that every man is to be presumed to be sane (*t*), and to possess a sufficient degree of reason to be responsible for his crimes,

(*r*) Maule, J., *disse*.
(*s*) 10 Cl. & F. 200.

(*t*) *Vide per* Rolfe, B., 8 Car. & K. 188.

Mere "moral insanity," or that which impels to all sorts of badness while the mind remains unimpaired, does not exonerate from responsibility. See *Furrer v. State*, 2 Ohio St. 54, 76; *Com. v. Heath*, 11 Gray (Mass.), 303; *Freeman v. People*, 4 Denio, 10; *State v. Lawrence*, 57 Me. 574; *Choice v. State*, 81 Ga. 424; *U. S. v. Schults*, 6 McLean's C. C. 121. But see *St. Louis Mut. Ins. Co. v. Graves*, 6 Bush (Ky.), 644; *Smith v. Com.*, 1 Duvall (Ky.), 224. Nor does the want of speech and hearing relieve from responsibility for crime. *Com. v. Hill*, 14 Mass. 207.

Sanity is presumed to be the normal state of the human mind, and it is never incumbent upon the prosecutor to give affirmative evidence that such state exists in a particular case. *Walker v. People*, 33 N. Y. (5 Tiff.) 147, 164. But, if evidence of insanity is introduced in behalf of a prisoner, and there is reasonable doubt of his sanity, he is as much entitled to the benefit of the doubt as if it arose upon any other branch of the case. *Chase v. People*, 40 Ill. 352; *Polk v. The State*, 19 Ind. 170; *People v. McCann*, 16 N. Y. (2 Smith) 58; *Com. v. Kimball*, 24 Pick. (Mass.) 373; *People v. Garbutt*, 17 Mich. 23; *Hopps v. People*, 31 Ill. 385, 393. The presumption of innocence is as strong as the presumption of sanity. *Id.* See this subject farther discussed in *Com. v. Eddy*, 7 Gray (Mass.), 583; *State v. Bartlett*, 43 N. H. 224; *Loeffner v. The State*, 10 Ohio St. 598; *People v. Myers*, 20 Cal. 518; *State v. Klinger*, 43 Mo. 127; *State v. Starling*, 6 Jones (N. C.), 366.

until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved, that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been, to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; this course is correct, accompanied with such observations and explanations as the circumstances of each particular case may require (u).

4th. "If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?"

To which question the answer was—That if the accused labours under a partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would [* 22] be exempt from punishment. If his delusion was * that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

In regard to the condition of mind at page 20, secondly supposed, we may observe that, although a total temporary absence of reason at the time when an offence was committed will excuse, yet if there be only a partial degree of imbecility, allowing a competent use of the reasoning faculty sufficient to have restrained those passions which produced the act charged as criminal, if there be thought and design, a power to distinguish the nature of actions, to discern the difference between good and evil, then the fact of the offence being proved, the judgment of the law must ensue and take effect (x).

According to our common law, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced: and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution (y). Indeed, in the bloody reign of Henry VIII., a statute was made (z), which enacted, that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. This savage and inhuman law was however repealed by the statute 1 & 2 Ph.

(u) See *Reg. v. Oxford*, 1 Townsend's St. Tr. 110. *Ferrer's Case*, 19 St. Tr. 946-7. *Per Erskine, arg. Hadfield's Case*, 27 St. Tr. 1809, *et seq.*

(x) *Per Hon. Chas. Yorke, S. G. arg. Lord*

(y) 1 Hale, P. C. 84.

(z) 83 Hen. 8, c. 20.

& M. c. 10. For, as observed by *sir Edward Coke (*a*), “the execution of an offender is for example, *ut pœna ad paucos, metus ad omnes* [*23] *perveniat*: but so it is not when a madman is executed; but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others.” But if there be any doubt whether the party be *compos* or not, this shall be tried by a jury. (612)

The mode of administering justice where insanity is relied upon as a defence at the trial of an accused person, or where it subsequently supervenes, has been thus further regulated by various enactments. By the statute 39 & 40 Geo. 3, c. 94, s. 1, where a person is proved to have been insane at the time of committing the offence of treason, murder, or felony, the jury must find specially that he was insane, and that he is acquitted on that account; and thereupon an order is to be made by the court, to keep the party in custody during the pleasure of the crown; and by sect. 2, when a person indicted for any offence is found to be insane upon arraignment, so that he cannot be tried, or when upon the trial he shall be found insane, the court may record such finding, and order the party to be kept in custody until the pleasure of the crown be known; and if such accused person be brought up to be discharged for want of prosecution, then a jury may be empanelled to try his insanity, and he may be kept in custody as before directed. Also by the 3 & 4 Vict. c. 54, s. 3, the provisions contained in the 1st section of the above statute of George III. are extended to persons charged with misdemeanors.

Further, by statute 3 & 4 Vict. c. 54, s. 1, if any person confined in prison under sentence shall appear to be insane, and that fact be certified by two justices of the peace, and two physicians or surgeons, a secretary of state may issue his warrant to convey such person to the proper asylum for the reception [*24] of insane persons; and *by statute 30 & 31 Vict. c. 12, s. 5 (*b*), a secretary of state is empowered to discharge absolutely or conditionally any criminal lunatic whilst undergoing sentence; and by s. 6 a criminal lunatic who, after his term of punishment has expired, continues *non compos*, is still to be detained in confinement.

III. Thirdly; as to artificial, voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary frenzy; our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal

(a) 3 Inst. 6.

(b) Amending and in part repealing the 23 & 24 Vict. c. 75.

(612) Where insanity in a person indicted is alleged or suspected, the most discreet and proper method of determining the question in an important case is a trial by jury; but other modes may be adopted in the discretion of the court. *Freeman v. The People*, 4 Denio, 9; *People v. Lake*, 2 Park. 215; *Shultz v. The State*, 13 Texas, 401; *Jones v. The State*, 13 Ala. 153.

So, after conviction, if a person then alleges by his counsel that he has become insane, and the court doubts on this point, it will ordinarily submit the question to a jury. But if, on inspection, the judge is fully satisfied the allegation is false, he will, without this further inquiry, proceed to the sentence. *Bonds v. The State*, Mart. & Yerg. (Tenn.) 142.

The time to which the inquiry relates is the present. It seeks to ascertain the prisoner's mental condition now, not what it was at the time of the commission of the alleged offense. *The State v. Arnold*, 12 Iowa, 479.

misbehaviour. A drunkard, says sir Edward Coke (c), who is *voluntarius dæmon*, hath no privilege thereby; but what hurt or ill, soever he doth, his drunkenness doth aggravate it: *nam omne crimen ebrietas incendit, et detegit*. It has been observed, that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The same indulgence, which may be necessary to make the blood move in Norway, would make an Italian mad. A German, therefore, says the President Montesquieu (d), drinks through custom, founded upon constitutional necessity; a Spaniard drinks through choice, or out of the mere wantonness of luxury: and drunkenness, he adds, ought to be more severely punished, where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy, as in Germany and more northern countries. And accordingly, in the warm climate of Greece, a law of Pittacus enacted, "that he who committed a crime when drunk, should receive a double punishment;" one for the crime itself, and the other for the ebriety which prompted him to commit it (e). The Roman law indeed made [* 25] great * allowances for this vice: "*per vinum delapsis capitalis pœna remittitur*" (f). But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another (g). (613)

(c) 1 Inst. 247.

(d) Sp. L. b. 14, c. 10.

(e) Puff. L. of N. b. 8, c. 3.

(f) Dig. 49, 16, 6.

(g) Plowd. 19.

(613) The doctrine that voluntary intoxication affords no excuse for crime committed under its influence is well established by judicial authority. See *Pirtle v. The State*, 9 Humph. (Tenn.) 663; *Hails v. The State*, 11 id. 154; *Kenny v. People*, 81 N. Y. (4 Tiff.) 330; *United States v. Cornell*, 3 Mason, 91, 111; *Schaller v. The State*, 14 Mo. 503; *Pennsylvania v. McFall*, Addison, 235, 257; *Tyra v. Com.*, 2 Metc. (Ky.) 1. A person in a state of voluntary drunkenness is subject to the same rule of conduct, and to the same rules and principles of law, that a sober man is; and when a provocation is offered, and the one offering it is killed, if it mitigates the offense of the man drunk, it should also mitigate the offense of the man sober. *Shannahan v. Com.*, 8 Bush (Ky.), 463. And this doctrine is held to apply even where the intoxication is so extreme as to make the person unconscious of what he is doing. *People v. Garbutt*, 17 Mich. 9.

Where a person is made drunk by stratagem, or the fraud of another, or through the unskillfulness of his physician, this puts him in the same condition as other insane persons, and equally excuses him. *Choice v. The State*, 31 Ga. 424; *People v. Robinson*, 2 Park. 235, 304. And where settled insanity is the result of long continued intoxication, it relieves the insane person from responsibility in the same way as insanity produced by any other cause. *Bailey v. The State*, 26 Ind. 422; *United States v. Drew*, 5 Mason's C. C. 28; *State v. McGonigal*, 5 Harring. (Del.) 510; *Cornwall v. The State*, Mart. & Yerg. (Tenn.) 147; *Lanegan v. People*, 50 Barb. 268; *Bliss v. Conn. and Pass. R. R.*, 24 Vt. 424; *Boswell v. Com.*, 20 Gratt. (Va.) 860. Thus, a person incapacitated from moral and intellectual agency by reason of *delirium tremens*, is irresponsible. *Macconnehey v. The State*, 5 Ohio St. 77; *Carter v. State*, 12 Texas, 500; *U. S. v. Clarke*, 2 Cranch's C. C. 158, and see cases cited above.

In some of the States the crime of murder is divided by statute into two degrees, and the distinguishing test is, that the first requires the specific intent to take life. Under these statutes it is held that where the accused is shown to have been so drunk when he did the deed as not to be capable of forming this specific intent, his offense of murder is only in the second degree. *Boswell v. Com.*, 20 Gratt. (Va.) 860; *People v. Belencia*, 21 Cal. 544; *People v. Hammill*, 2 Park. 235; *State v. Bullock*, 13 Ala. 413; *Pigman v. The State*, 14 Ohio, 555; *Keenan v. Com.*, 8 Wright (Penn.), 55; *State v. Harlow*, 21 Mo. 446; *Pirtle v. The State*, 9 Humph. (Tenn.) 663; *Hails v. The State*, 11 id. 154; *Swan v. The State*, 4 id. 136; *Kelly v.*

Nevertheless where malice or a particular intent is an essential ingredient in a crime, or where the question is whether an act was done wilfully or by accident, the state of the accused in regard to sobriety may be material (*h*).

IV. A fourth deficiency of will, is where a man commits an unlawful act by misfortune or mischance, not by design. Here the will observes a total neutrality, and does not co-operate with the deed; which therefore wants one main ingredient of a crime. Of this, when it affects the life of another, we shall find more occasion to speak hereafter; at present only observing, that if any accidental mischief happens to follow from the performance of a lawful act, the party stands excused from guilt; but if a man be doing anything unlawful, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he may be criminally guilty of the consequence, if not too remote, of his first misbehaviour (*i*). (614)

V. Fifthly; ignorance or mistake is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an *error in point of law. As if a man, intending to kill a burglar in his own house, by mistake kills one of his own family, this is no criminal action [**26*]; but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so; this is wilful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence *Ignor-*

(*h*) *Reg. v. Cruse*, 8 C. & P. 541, 546; *R. v. Thomas*, 7 C. & P. 820.

(*i*) 1 Hale, P. C. 39.

(*k*) *Levett's Case*, Cro. Car. 538.

The State, 3 Sm. & M. (Miss.) 518. If, however, the specific intent to take life exists, the homicide is murder in the first degree, though the prisoner was intoxicated at the time he committed the act; as where a man, first having resolved to kill another, drinks to intoxication and then kills him. *Smith v. Com.*, 1 Duvall (Ky.), 224; *State v. Gut*, 13 Minn. 441. So a man, though drunk, may not be so drunk as to exclude the particular intent. *Kenny v. People*, 31 N. Y. (4 Tiff.) 330.

If one who is too drunk to entertain the specific intent to steal takes property and returns it before the intent could arise in his mind, he is not guilty of larceny. See *Com. v. State*, Thacher's Crim. Cas. 163; *State v. Cross*, 27 Mo. 332; *Golden v. State*, 25 Ga. 537; *Mooney v. State*, 33 Ala. 419; *O'Herrin v. The State*, 14 Ind. 420; *Dawson v. State*, 16 id. 428; *People v. Harris*, 29 Cal. 678. So a man passing counterfeit money is not criminally liable if too drunk at the time to know it is counterfeit, or, consequently, to entertain the intent to defraud. *Pigman v. The State*, 14 Ohio, 555; *U. S. v. Roudenbush*, 1 Bald. C. C. 514.

(614) The thing intended to be done must be an act morally wrong, *malum in se*; if merely *malum prohibitum*, the party will not be answerable for the unforeseen consequence. See *Com. v. Judd*, 2 Mass. 329; *Com. v. Cone*, id. 132; *Com. v. Dana*, 2 Metc. (Mass.) 329.

antia juris, quod quisque tenetur scire, neminem excusat, is as well the maxim of our own (l), as it was of the Roman law (m). (615)

VI. A sixth species of defect of will is that arising from compulsion or inevitable necessity; from a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are only inflicted for the abuse of that free will, which God has given to man, it is therefore highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

1. Of this nature, in the first place, is the obligation of civil subjection, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality. How far this *excuse will be admitted *in foro conscientiæ*, or whether the inferior in this case is not bound to obey the divine, rather than the human law, it is not my business to decide; though the question, I believe, among the casuists, will hardly bear a doubt (n). But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff, who burnt Latimer and Ridley, in the bigoted days of Queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an office; being justified by the commands of that magistracy, which endeavoured to restore superstition under the holy auspices of its merciless sister, persecution.

As to persons in private relations; constraint of a superior is sometimes allowed as an excuse for criminal misconduct, by reason of the matrimonial subjection of the wife to her husband; but neither a son nor a servant is excused for the commission of any crime, by the command or coercion of the parent or master (o). Thus if a woman commit theft, or burglary, by the coercion of her husband; or even in his company, which the law *primò*

(l) Plowd. 343; *Ex parte Barronet*, Dears. 51. Ignorance of a law which is of recent enactment may, however, in some cases afford just ground for application to the leniency of the crown. Thus where the prisoner was indicted for maliciously shooting, and the offence was committed within a few weeks after the passing of the 39 Geo. 3, c. 37, and before notice of it could have reached the place where the offence was committed, the judges thought that, as he could not have known of that act, he ought to have a pardon. *R. v. Bailey*, Russ. & Ry. 1, 4; *R. v. Esop*, 7 C. & P. 456.
(m) Dig. 22, 6, 9.
(n) *Ante*, vol. i. p. 85.
(o) 1 Hawk. P. C. 8.

(615) Every man is presumed to know the laws of the country in which he dwells (*Lyons v. Richmond*, 2 Johns. Ch. 51; *Fellows v. Heermans*, 4 Lans. 230, 243; *Jacobs v. Morange*, 47 N. Y. [2 Sick.] 57); or in which he transacts business if he resides abroad (*Cambisico v. Maffet*, 2 Wash. C. C. 98); and ignorance of the existence of the law which is violated will not excuse from the consequences of guilt any person who has capacity to understand the law. *Com. v. Bagley*, 7 Pick. (Mass.) 279; *Hurt v. State*, 19 Ala. 19; *Whitton v. The State*, 37 Miss. 379; *Winsheart v. The State*, 6 Ind. 30; *The Joseph*, 8 Cranch, 451. See *Com. v. Doane*, 1 Cush. (Mass.) 5; *The State v. Homes*, 17 Mo. 379; *State v. Bond*, 8 Iowa, 540.

Ignorance or mistake in point of fact is, in all cases of supposed offense, a sufficient excuse. *Myers v. The State*, 1 Conn. 502. See *Com. v. Drew*, 19 Pick. (Mass.) 179, 184. See this principle further illustrated in *Farbach v. The State*, 24 Ind. 77; *Rineman v. The State*, 24 id. 80; *Isham v. The State*, 38 Ala. 213, 218; *U. S. v. Pearce*, 2 McLean, 14. Ignorance of the laws of a foreign country is ignorance of fact. *Haven v. Foster*, 9 Pick. (Mass.) 112.

facie construes a coercion: she is dispunishable, being considered to have acted by compulsion, and not of her own will (*p*). (616) Which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of king Ina, the West Saxon (*q*). And it appears that among the northern nations on the continent, this privilege extended to any woman transgressing in concert with a man, and to any servant who committed a joint offence with a freeman; the male or freeman only was punished, the female or slave was dismissed: "*proculdubio quod alterum libertas, alterum necessitas impelleret* (*r*)". But, (besides that in our law, which is a stranger to slavery, no impunity is given to servants, who are as * much free agents as their masters) even with regard to wives [*28] this rule admits of exception in the case of crimes that are *mala in se*, and prohibited by the law of nature, as murder (*s*) and the like: (617) not only because these are of a deeper dye, but also, since in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. In treason also (the highest crime which a member of society can, as such, be guilty of), no plea of coverture shall excuse the wife; no presumption of the husband's coercion shall extenuate her guilt (*t*): as well because of the odiousness and dangerous consequence of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right to that obedience from a wife, which he himself as a subject has forgotten to pay. In some inferior misdemeanors also we may remark exceptions to the rule which confers immunity on a feme covert: thus husband and wife may be jointly convicted of an assault (*u*), and a wife may be indicted with her husband for keeping a

(*p*) 1 Hale, P. C. 45, 621.

(*q*) Cap. 57.

(*r*) Stiernh. de Jure Sueon. l. 2, c. 4.

(*s*) *Reg. v. Manning*, 2 Car. & K. 908, n.

(*t*) 1 Hale, P. C. 47.

(*u*) *Reg. v. Cruso*, 8 C. & P. 541, 557, 558.

See *Reg. v. Smith*, Dears. & B. 553.

(616) The presumption of coercion, which the law raises where a criminal act is committed by a married woman in the presence of her husband, is only *prima facie*, and like other presumptions may be repelled. *Uhl v. Commonwealth*, 6 Gratt. (Va.) 706; *Wagener v. Bill*, 19 Barb. 321. If the testimony shows nothing farther than that the crime was committed while the husband and wife were both together, the wife is to be acquitted. *Com. v. Trimmer*, 1 Mass. 479; *Com. v. Egan*, 103 id. 71. But if it appears that the wife was the instigator or only active party, or, that the husband, though present, was incapable of coercing, as that he was a cripple confined to his bed, or that the wife was the stronger of the two, then she is to be convicted. *Quinlan v. People*, 6 Park. 9; *State v. Parkerson*, 1 Strobb. (S. C.) 169. See *Miller v. State*, 25 Wis. 384.

The wife may therefore be proceeded against jointly with her husband in the same indictment, and must rely on the coercion for an acquittal only when the proofs are adduced at the trial. *Com. v. Murphy*, 2 Gray (Mass.), 510; *State v. Parkerson*, 1 Strobb. (S. C.) 169; *The State v. Nelson*, 29 Me. 329; *The State v. Bents*, 11 Mo. 27; *The State v. Montgomery, Cheves* (S. C.), 120.

(617) It has been held that where the wife commits the aggravated offense of treason, murder, robbery, or other crime *malum in se*, even in company with, or by coercion of, her husband, she is punishable the same as if she were a *feme sole*. See *Com. v. Trimmer*, 1 Mass. 476; *Com. v. Neal*, 10 id. 152; *Martin v. Com.*, 1 id. 347; *Wagener v. Bill*, 19 Barb. 321. But the later and better opinion seems to be that the coercion and presence of the husband is a good defense in all cases, not excepting even the higher grades of felonies mentioned. See 1 Whart. Crim. Law, § 72; 1 Bishop's Crim. Law, § 858, and note.

brothel; (618) for this is an offence touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex (*x*). (619) And where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence, as much as any feme sole.

2. Another species of compulsion or necessity is what our law calls duress
 a. Duress per minas (*y*); or threats and menaces, which induce a fear of death or bodily harm, and which may take away for that reason the guilt
 [* 29] of *crime; at least before a human tribunal. But then that fear which compels a man to do an unwarrantable action, ought to be just and well-grounded; such, "*qui cadere possit in virum constantem, non timidum et meticulosum*," as Bracton expresses it (*z*), in the words of the civil law (*a*). Therefore, in time of war or rebellion, a man may be justified in doing treasonable acts (*b*) by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace (*c*). (620) This however seems only, or at

(*z*) 1 Hawk. P. C. 2, 8.

(*y*) See vol. i. p. 161.

(*e*) L. 2, f. 16.

(*d*) Dig. 4, 2, 5, and 6.

(*b*) At the trial of the Duke of Hamilton for treason, during the time of the Commonwealth (4 St. Tr. 1167-8), the subject *supra* was discussed. The charge against the duke was that he had traitorously invaded this country in a hostile manner, and levied war against the people, &c.; and to this charge the answer first relied upon was, that the accused had acted by command of the parliament of Scotland, which he could not disobey without "incurring the severest censures;" that the duke had acted but as a servant in the matter under investigation, and was tied by oaths and penalties to give obedience: if he had disobeyed, he had been liable to punishment; therefore it was hard for him to be punished for obeying also. Referring to the ground thus relied on, the Attorney-General for the Commonwealth admitted the rule as generally true "that a

man is not to be punished for an act which he doth by the necessity of obedience, because he hath not *absolutum arbitrium*; but (said the Attorney-General) this rule is capable of restriction, as well in law as in reason; for, if the act be lawful, a superior command may dispense with some circumstances, but if unlawful, the servant obeying is not the less to be blamed. Necessity of obedience may excuse *in privatis*, but never *in publicis* — *non valet privilegium contra rempublicam*." The duke of Hamilton was convicted and executed.

(*c*) 1 Hale, P. C. 50. The fear of having houses burnt, or goods spoiled, is no excuse in the eye of the law for joining and marching with rebels. A force upon the person, and present fear of death, will, however, excuse, provided this force and fear continue all the time the party remains with the rebels. It is incumbent upon men who make force their defence to show an actual force, and that they joined *pro timore mortis, et recesserunt quàm citò potuerunt*. Fost. 14, 216.

(618) The husband and wife together may be indicted for forcible entry and detainer (*State v. Harveey*, 3 N. H. 65), or for keeping a liquor nuisance. *Com. v. Tryon*, 99 Mass. 442.

It is stated to be a general principle that for fines and forfeitures incurred by the act of the wife for which the husband is liable, either separately or conjointly with his wife, he must be made a party to the judgment, and equally subject to arrest and imprisonment to enforce the payment. *Ruther v. State*, 1 Port. (Ala.) 182.

A *feme covert*, upon whose lands her husband erects a nuisance, cannot be made criminally answerable for it. *People v. Townsend*, 3 Hill, 179.

(619) A married woman, living apart from her husband, may be indicted alone and punished for keeping a house of ill fame. *Com. v. Lewis*, 1 Metc. (Mass.) 151. And it is held that a wife who sells intoxicating liquor without a license, in her husband's absence, is not presumed to act under his coercion, and is responsible. *Com. v. Murphy*, 2 Gray (Mass.), 510. And see *Com. v. Gannon*, 97 Mass. 547; *Com. v. Welch*, id. 593.

But if the wife commits the criminal act with the concurrence or command of the husband, the latter may be indicted for it. *Williamson v. The State*, 16 Ala. 431.

(620) If one joins with rebels from fear of present death, he is not a traitor while the constraint remains. But the fear of having property wasted or destroyed, or of suffering any

least principally, to hold as to positive crimes, so created by the laws of society; and which therefore society may excuse; but not as to natural offences so declared by the law of God, wherein human magistrates *are only the [* 30] executioners of divine punishment. And therefore, though a man be violently assaulted, and has no other possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent (d). (621) But in such a case he is permitted to kill the assailant; for there the law of nature and self-defence, its primary canon, have made him his own protector.

3. There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action, which without such obligation would be criminal. And that is, when a man has his choice of two evils set before him, and being under a necessity of choosing one, he chooses the less pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive than active; or, if active, it is rather in rejecting the greater evil than in choosing the less. Of this sort is that necessity, where a man by the commandment of the law is bound to arrest another for a felony, or to disperse a riot, and resistance is made to his authority: it may here be justifiable and even necessary to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue. For the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public; and therefore excuse the felony, which the killing would otherwise amount to (e). (622)

4. There is yet another case of necessity, which has occasioned speculation among writers upon general law, although free from doubt in our own; viz. whether a man in extreme want of food or clothing may justify stealing either, to relieve his present necessities? And this both [* 31] * Grotius (f) and Puffendorf (g), together with other foreign jurists, have held in the affirmative; maintaining by many ingenious, humane,

(d) 1 Hale, P. C. 51.

(f) De Jure B. et P. l. 2, c. 2.

(e) 1 Hale, P. C. 53.

(g) L. of Nat. and N. l. 2, c. 6.

other mischief not endangering the person, is no justification of a traitorous act. *Respublica v. McCarty*, 2 Dall. 86; 1 Bishop's Crim. Law, § 347.

So it is no justification of a criminal act that it was committed in pursuance of the command of a superior to an inferior; as of a military officer to a subordinate (*U. S. v. Jones*, 8 Wash. C. C. 209, 220; *Com. v. Blodgett*, 12 Metc. [Mass.] 56); of a parent to a child, a master to his servant, or of a principal to his agent. See *Brown v. Howard*, 14 Johns. 119; *Hays v. The State*, 18 Mo. 246; *State v. Bugbee*, 23 Vt. 82; *Com. v. Drew*, 3 Cush. (Mass.) 279; *Klüffeld v. The State*, 4 How. (Miss.) 804; *State v. Bell*, 5 Port. (Ala.) 365; *Curtis v. Knox*, 2 Denio, 341; *Com. v. Hadley*, 11 Metc. (Mass.) 66.

(621) A man who is attacked by a ruffian, and can only save his own life by taking the life of the ruffian, may lawfully do so. *People v. Doe*, 1 Mich. 451. But there are cases in which one of two innocent parties has no right to prefer his own life to that of the other. *U. S. v. Holmes*, 1 Wall. Jr. C. C. 1. See Bish. Crim. Law, § 348.

(622) To justify the homicide of a felon for the purpose of arresting him, the slayer must show not only a felony actually committed, but also that he avowed his object, and that the felon refused to submit. *The State v. Roone*, 2 Dev. (N. C.) 58.

and plausible reasons, that in such cases the community of goods by a kind of tacit concession of society is revived. And some even of our own lawyers have held the same (*h*), though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians: at least it is now antiquated, the law of England admitting no such excuse at present (*i*). (623) And this its doctrine is agreeable not only to the sentiments of many of the wisest ancients, particularly Cicero (*k*), who holds that "*sum cuique incommodum ferendum est, potius quam de alterius commodis detrahendum*;" but also to the Jewish law, as certified by king Solomon himself (*l*): "if a thief steal to satisfy his soul when he is hungry, he shall restore seven-fold, and shall give all the substance of his house:" which was the ordinary punishment for theft in that kingdom. And this is founded upon the highest reason: for men's properties would be under a strange insecurity, if liable to be invaded according to the wants of others, of which wants no man can possibly be an adequate judge, but the party himself who pleads them. In this country, especially, there would be a peculiar impropriety in admitting so dubious an excuse: for by our laws such sufficient provision is made for the poor by the power of the civil magistrate, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature. Therefore our laws ought by no means to be taxed with being unmerciful for denying this privilege to the necessitous; especially when we consider that the crown on the representation of its ministers of justice, has a power to soften the law, and to extend mercy in cases of peculiar hardship.

[* 32] * VII. To these several cases, in which the incapacity of committing crime arises from a deficiency of the will, we may add one more, in which the law supposes an incapacity of doing wrong, from the excellence and perfection of the person; which extend as well to the will as to the other qualities of the mind. I mean the case of the sovereign; who by virtue of his royal prerogative, is not under the coercive power of the law (*m*); which will not suppose him capable of committing a folly, much less a crime. We are therefore, out of reverence and decency to forbear any idle inquiries as to what would be the consequence if the sovereign were to act thus and thus; since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do anything inconsistent with his station and dignity; and therefore has made no provision to remedy such grievance. But of this sufficient was said in a former volume (*n*), to which I must refer the reader.

VII. Where person supposed to be incapable of committing a wrong.

(*h*) Britton, c. 10; Mirr. c. 4, s. 16.

(*i*) 1 Hale, P. C. 54.

(*k*) De Off. l. 3, c. 5.

(*l*) Prov. vi. 30.

(*m*) 1 Hale, P. C. 44.

(*n*) *Ante*, vol. i. p. 293.

(623) But if we accept the doctrine that, under any circumstances, a man to save his own life may take another's life, surely to save his own life he may take the other's property. 1 Bish. Crim. Law, § 849. And see *Barron v. Page*, 5 Hayw. (Tenn.) 97.

As to the necessity which will justify laboring on the Lord's day, see *The State v. Goff*, 20 Ark. 293.

* CHAPTER III.

[* 33]

PRINCIPALS AND ACCESSORIES.

HAVING shown in the preceding chapter what persons are, or are not, capable of committing crimes, we will next make a few remarks on the different degrees of guilt among persons who are capable of offending; they may be principals or accessories.

I. A man may, in the contemplation of our law, be a principal in an offence in either of two degrees. A principal in the first degree, is he who is the actor, or absolute perpetrator of the crime; and in the second degree he is, who is present, aiding and abetting the fact to be done (*a*). Which presence need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance (*b*). (624) So in case of murder by poisoning, a man may be a principal felon, by preparing and laying the poison, or persuading another to drink it (*c*) who is ignorant of its poisonous quality (*d*), or giving it to him for that purpose; and yet not administer it himself,

(*a*) 1 Hale, P. C. 615.
(*b*) Foster, 350.

(*c*) Kel. 52.
(*d*) Foster, 349.

(624) One present while a felony is committed, if he takes no part in it, and does not act in concert with those who commit it, will not be a principal in the second degree, merely because he did not endeavor to prevent the felony or apprehend the felon. *Plummer v. Com.*, 1 Bush (Ky.), 76; *Connaughty v. State*, 1 Wis. 169; *People v. Ah Ping*, 27 Cal. 489. Mere presence is not sufficient to constitute the party a principal, without he aids, assists or abets in some manner. *Connaughty v. State*, 1 Wis. 169.

One who keeps guard outside of the house while his companions are in the house committing the felony, is, in the construction of law, present aiding and abetting in the felony, sufficient to make him a principal in the second degree. *Com. v. Knapp*, 9 Pick. (Mass.) 496; *State v. Hardin*, 2 Dev. & Bat. (N. C.) 407; *State v. Coleman*, 5 Port. (Ala.) 82; *Selvidge v. State*, 80 Texas, 60; *State v. Squaires*, 2 Nev. 226; *Breese v. State*, 12 Ohio St. 146; *Doan v. State*, 26 Ind. 495.

All who by their presence countenance a riot or an affray are criminally responsible. *Williams v. The State*, 9 Miss. 268; *Hawkins v. The State*, 18 Ga. 323.

The distinction between principals in the first and second degree is only formal, and is said to be a distinction without a difference. *State v. Davis*, 29 Mo. 891; *State v. Fley*, 2 Brev. (S. C.) 838; *State v. McGregor*, 41 N. H. 407; *King v. The State*, 21 Ga. 220; *Brown v. The State*, 28 id. 199. An indictment against a man as principal of the first degree may be sustained by proof of his being principal of the second degree; and, on the contrary, an indictment against him as principal of the second degree is supported by proof that he is principal of the first degree. 1 Bish. Crim. Law, § 648. See *Shaw v. The State*, 18 Ala. 547; *The State v. Cameron*, 2 Chand. (Mich.) 172; *State v. Anthony*, 1 McCord (S. C.), 285.

Occasionally the provisions of a statute require the distinction between the degrees to be observed. See *Huffman v. Com.*, 6 Rand. (Va.) 685; *Ranwick's Case*, 2 Va. Cas. 356.

A party charged as principal in the second degree may be convicted, though the party charged as principal in the first degree is acquitted. *Brown v. State*, 28 Ga. 216; *People v. Bears*, 10 Cal. 68; *State v. Ross*, 29 Mo. 82. And on an indictment for murder, the court, in its discretion, may try the principal in the second degree before the principal in the first degree. *Boyd v. State*, 17 Ga. 194.

nor be present when the very deed of poisoning is committed (e). And [*34] * the same reasoning will hold, with regard to other murders committed in the absence of the murderer, by means which he had prepared beforehand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed; letting out a wild beast, with an intent to do mischief, or exciting a madman to commit murder, so that death thereupon ensues; in every of these cases the party offending is guilty of murder as a principal, in the first degree. For he cannot be called an accessory, that necessarily presupposing a principal; and the poison, the pitfall, the beast, and the madman, cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal, and if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist (f).

II. An accessory is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either before or after the fact committed. (625) In considering the nature of which degree of guilt, we will, first, examine what offences admit of accessories, and what not: secondly, who may be an accessory before the fact: thirdly, who may be an accessory after it: and, lastly, how accessories, considered merely as such, and distinct from principals, are to be treated.

1. And, first, as to what offences admit of accessories, and what not. In high treason there are no accessories, but all are principals: the same acts, which make a man accessory in felony, making him a principal in treason, upon account of the heinousness of the crime (g). [*35] * Besides, it is to be considered, that the bare intent to commit treason is many times actual treason: as imagining the death of the king, or conspiring to take away his crown. And, as no one can advise and abet such a crime without an intention to have it done, there can be no accessories before the fact; since the very advice and abetment amount to principal treason. But this will not hold in the inferior species of treason, which do not amount to the legal idea of compassing the death of the king, queen, or prince. For in those no advice to commit them, unless the thing be actually performed, will make a man a principal traitor (h). In murder and other fel-

(e) 3 Inst. 148. "He who does an act by means of an innocent agent commits the act himself," per Jervis, C. J., *Reg. v. Wilson*, Dears. & B. 128.

(f) 1 Hale, P. C. 617; 2 Hawk. P. C. 815.

(g) 3 Inst. 138; 1 Hale, P. C. 618.

(h) Foster, 842.

(625) A person who participates in the felony, but without being so near at the time of its commission as to constitute him a principal, is to be deemed an accessory. See *Com. v. Knapp*, 9 Pick. (Mass.) 496, 516; *Green v. The State*, 13 Mo. 382; *Tate v. The State*, 6 Blackf. (Ind.) 110; *Brennan v. People*, 15 Ill. 511. One indicted as principal cannot be convicted on proof showing him to be merely an accessory (*Hughes v. The State*, 12 Ala. 458; *Hately v. State*, 15 Ga. 346; *State v. Wyckoff*, 31 N. J. L. 65; *People v. Kater*, 23 How. 98); and a principal, even of the second degree, cannot be held under an indictment charging him as accessory. See *id.*; 1 Bish. Crim. Law, § 663.

A man may, by separate acts, be both an accessory before and an accessory after the fact. See *Norton v. People*, 8 Cow. 187; *The State v. Coppenburg*, 2 Strobb. (S. C.) 273; *Stoops v. Com.*, 7 Serg. & R. (Penn.) 491.

onies there may be accessories: except only in those offences, which in judgment of law are sudden and unpremeditated, as manslaughter and the like; which therefore cannot have any accessories before the fact (i). So too in crimes under the degree of felony, there are no accessories either before or after the fact; but all persons concerned therein, if guilty at all, are principals (k). And by the stat. 24 & 25 Vict. c. 94, s. 8, whosoever shall "aid, abet, counsel, or procure" the commission of any misdemeanor, whether at common or by the statute law, shall be liable to be tried, indicted, and punished as a principal offender.

The rule that there cannot be accessories in treason or in misdemeanors, the highest and lowest offences, is grounded upon different reasons. In treason all are principals, *propter odium delicti*; in trespass all are principals, because the law, *quæ de minimis non curat*, does not descend to distinguish the different shades of guilt in petty misdemeanors. Further, it is a maxim, that *accessorius sequitur naturam sui principalis* (l): and therefore an accessory cannot be guilty of a higher crime than his principal; being only punished as a partaker of his. (626)

* 2. As to the second point, who may be an accessory before the fact [* 36] fact; sir Matthew Hale (m) defines him to be one, who being absent at the time of the crime committed, doth yet procure, counsel, 2. Accessory before the fact. or command another to commit a crime. Herein absence is necessary to make him an accessory; for if such procurer, or the like, be present, he is guilty of the crime as principal. If A then advises B to kill another, and B does it in the absence of A, now B is principal, and A is accessory in the murder. (627) And this holds, even though the party killed be not *in rerum natura* at the time of the advice given. As if A, the reputed father, advises B, the mother of a bastard child, unborn, to strangle it when born, and she does so; A is accessory to this murder (n). And it is also settled (o), that whoever procures a felony to be committed, though it be by the intervention

(i) 1 Hale, P. C. 615.

(k) *Ibid.* 618.

(l) 3 Inst. 189.

(m) 1 Hale, P. C. 615, 616.

(n) *R. v. Parker*, Dyer, 186.

(o) *Foster*, 125.

(626) Properly, there are no accessories except in felonies. In treason and in misdemeanors, the highest and lowest of offenses, all concerned are principals. *Sanders v. State*, 18 Ark. 198; *State v. Cheek*, 13 Ired. (N. C.) 114; *State v. Bardon*, 1 Dev. (N. C.) 518; *Com. v. Macomber*, 8 Mass. 254; *Whitney v. Turner*, 2 Ill. (1 Scam.) 253; *Lowenstein v. People*, 54 Barb. 299; *Whitaker v. English*, 1 Bay. (S. C.) 15; *Chanet v. Parker*, 1 Mill (S. C.) Const. 383; *U. S. v. Hanway*, 2 Wall, Jr., C. C. 189, 195; *Williams v. State*, 20 Miss. 58; *U. S. v. Morrow*, 4 Wash. C. C. 733. See *U. S. v. Burr*, 4 Cranch, 472, 501.

(627) That an accessory should have originated the design of committing the offense is not material. If the principal previously formed the design, and the alleged accessory encouraged him to carry it out, he is guilty as accessory of the offense. *Keithler v. State*, 18 Miss. 192. So the procurement may be either by direct means, as by hire, counsel, or command; or, indirect, by evincing an express liking, approbation, or assent to another's felonious design. *People v. Norton*, 8 Cow. 137.

It is no excuse for the party committing the offense that the command to do so proceeded from a superior to an inferior; as from a master to his servant, or from a parent to his child. See *Curtis v. Knox*, 2 Denio, 341; *Hayes v. State*, 13 Mo. 248; *Com. v. Drew* 3 Cush. (Mass.) 279. And see *ante*, page 29, note 15.

A party who procures a felony to be done by an insane or innocent medium, or a slave, is himself liable as a principal in the first degree. *Com. v. Hill*, 11 Mass. 86; *Adams v. People*, 1 N. Y. (1 Comst.) 173; *Berry v. State*, 10 Ga. 511.

of a third person, is an accessory before the fact. It is likewise a rule, that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that naturally or necessarily ensues upon that unlawful act; but is not accessory to any act distinct from the other. As if A commands B to burn C's house, and in doing so the house of D is also burnt, B is guilty of arson as principal, and A is an accessory to the burning D's house (p). But if A commands B to burn C's house, and he, in so doing, commits a robbery; now A, though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and un consequential nature (q). Yet if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison Titius, he is stabbed or shot, and dies; the commander is still accessory to the murder, for the substance of the thing commanded was the death of [* 37] *Titius, and the manner of its execution is a mere collateral circumstance (r).

An accessory before the fact to any felony may now be indicted, tried, convicted, and punished in all respects as if he were a principal felon (s). (628) And whosoever shall counsel, procure, or command any other person to commit a felony, whether at common or by the statute law, "shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact, to the same felony, if convicted as an accessory, may be punished" (t).

3. An accessory after the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon (u).

Therefore, to make an accessory *ex post facto*, it is in the first place requisite that he know of the felony committed (v). (629)

8. Accessory after the fact.

(p) Plowd. 475.

(q) 1 Hale, P. C. 617.

(r) 2 Hawk. P. C. 816.

(s) 24 & 25 Vict. c. 94, s. 1.

(t) *Id.* s. 2. The soliciting and inciting a

man to commit a felony, where no felony is actually committed, constitutes a misdemeanor. *Reg. v. Gregory*, 1 L. R. C. C. 77.

(u) 1 Hale, P. C. 618.

(v) 2 Hawk. P. C. 819.

(628) In the absence of some enabling statute an accessory cannot be indicted, tried, or convicted, before a conviction of the principal, unless by his consent. See *Baron v. People*, 1 Park. 246; *State v. Pybass*, 4 Humph. (Tenn.) 442; *U. S. v. Crane*, 4 McLean, 317; *Com. v. Knapp*, 10 Pick. (Mass.) 477; *State v. Duncan*, 6 Ired. (N. C.) 236. By the legislation of some of the States, proceedings may now be carried on against the accessory, irrespective of the case against the principal offender. Thus in California, *People v. Bearss*, 10 Cal. 68; Iowa, *Bonsell v. U. S.*, 1 Greene, 111; Illinois, *Baxter v. People*, 8 Gilman, 368; *Brennan v. People*, 15 Ill. 511, 516; Maine, *State v. Ricker*, 29 Me. 84; Missouri, *Loughridge v. State*, 6 Mo. 594; Massachusetts, R. S., chap. 183, § 2; Nevada, *State v. Jones*, 7 Nev. 408; Ohio, *Noland v. State*, 19 Ohio, 181; Pennsylvania, Rev. Acts, 1860, bill 11, § 43; and perhaps in some of the other States the accessory before the fact is either actually or substantially a principal. See 1 Bish. Crim. Law, § 670. The general rule is that in cases where, by statute, the offense of an accessory is made substantive and independent, then the accessory can be tried independently of the principal. *Brown v. State*, 13 Ohio St. 496. See *United States v. Mills*, 7 Pet. 138; *United States v. Crane*, 4 McLean, 317.

(629) To constitute an accessory after the fact the aid and assistance must be given after the felony is fully completed (*Harrel v. State*, 39 Miss. 702); and the defendant must know that the felon is guilty. See 1 Whart. Crim. Law, § 147.

In the next place, he must receive, relieve, comfort, or assist the felon. And generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessory. As furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him (x). So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. * But to relieve a felon in gaol with [* 38] clothes or other necessities (unless this be done in breach of the prison regulations), is no offence; for the crime imputable to this species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law (y).

The felony must be complete at the time of the assistance given; else it makes not the assistant an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent: this does not make him accessory to the homicide; for, till death ensues, there is no felony committed (z). But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. (630) If the parent assists his child, or the child his parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband receives his wife, having any of them committed a felony, the receiver becomes an accessory *ex post facto* (a). But a feme-covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord (b).

It is now enacted (c) that an accessory after the fact to any felony, whether at common law or by the statute law, "may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and may thereupon be punished in *like manner as any accessory after the fact to the same felony, if convicted as an accessory, [* 39] may be punished. (631)

It is clear that one acquitted as principal may be indicted as an accessory after the fact; since that is an offence involving a different species of guilt, and is subsequent in its commencement to the other (d).

(x) *Ibid.* 317, 318.

(y) 1 Hale, P. C. 620, 621.

(z) 2 Hawk. P. C. 320.

(a) 3 Inst. 108; 2 Hawk. P. C. 320.

(b) 1 Hale, P. C. 621.

(c) 24 & 25 Vict. c. 94, s. 3.

(d) 1 Hale, P. C. 626.

A man, by helping the accessory before the fact to elude justice, may become an accessory after the fact, the same as by helping the principal felon. See *The State v. Payne*, 1 Swan (Tenn.), 383; and such accessory after the fact is deemed an accessory to the principal felon. *Wright v. The State*, 5 Yerg. (Tenn.) 154; *Cassels v. The State*, 4 id. 149.

(630) In Massachusetts this rule is changed to some extent by statute. See Rev. Stat. chap. 133, § 6.

(631) See *ante*, page 351, note 622.

As to the punishment of an accessory after the fact to any felony, whether at common or by the statute law, it is enacted (e) that every such accessory shall (unless otherwise specially provided) be liable to be imprisoned for any term not exceeding two years, with or without hard labour, and "it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognisances and to find sureties, both or either, for keeping the peace, in addition to such punishment: Provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year."

As to accessories generally, it has been enacted as follows:—
 Proceedings against accessories generally. 1. If any principal offender be convicted of felony, it shall be lawful to proceed against an accessory, before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding the principal die, or be pardoned, or otherwise delivered before attainder; and every such accessory shall upon conviction suffer the same punishment as he would have suffered if the principal had been attainted (f).

2. Any number of accessories at different times to any felony may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon be not included in the same indictment, or be not in custody or amenable to justice (g).

3. Where a felony has been wholly committed within England, the offence [* 40] of any accessory, before or after * the fact, to such felony may be dealt with, and punished by any court having jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act by reason whereof such person shall have become such accessory was committed; and in every other case the offence of an accessory, before or after the fact, to a felony may be dealt with, inquired of, tried, determined, and punished by any court having jurisdiction to try the principal felony or any felonies committed in any county or place in which such person was apprehended or is in custody, whether the principal felony were committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within her majesty's dominions or without, or partly within and partly without such dominions (h). (632)

(e) 24 & 25 Vict. c. 94, s. 4.

(f) 24 & 25 Vict. c. 94, s. 5.

(g) *Id.* s. 6.

(h) *Id.* s. 7. Where any person, within the jurisdiction of the Admiralty of England becomes an accessory to a felony, whether at common or by the statute law, and whether such felony be committed within that jurisdiction or elsewhere, or be begun within that

jurisdiction and completed elsewhere, or be begun elsewhere and completed within that jurisdiction, the offence of such person is felony; and in any indictment for such offence the venue will be the same as if the offence had been committed in the county or place in which such person shall be indicted, the offence being averred to have been committed "on the high seas." *Id.* s. 9.

(632) The jurisdiction of the offence of an accessory before or after the fact is in the county where the offence was committed, although the offence of the principal was committed in another county. *People v. Hodges*, 27 Cal. 340.

The principal is chargeable in the particular venue for his acts done in it, notwithstanding his non-residence at the time. *Com. v. Gillespie*, 7 Serg. & R. (Penn.) 469; *Adams v. People*, 1 N. Y. (1 Comst.) 173; S. C., 8 Denio, 190; *U. S. v. Davis*, 2 Sumn. C. C. 483; 1 Whart. Crim. Law, § 210, m.

CHAPTER IV.

[*41]

THE NATURE AND CLASSIFICATION OF INDICTABLE OFFENCES.

THE main ingredients in an act criminal and indictable are two in number: 1st, the act must be such as affects and prejudices the public; 2ndly, subject to some few and peculiar exceptions, of which the more important will hereafter be duly noticed, it must have proceeded from a guilty mind — it must have been done with a criminal intent. A crime involves some degree of moral turpitude, because it involves a violation of our law, which every subject of the crown is presumed to know. Thus much will partially appear, if a brief and rapid survey be taken of acts which are criminal and indictable.

I. A criminal act may be direct and simple in its nature: for instance, treason, murder, burglary, robbery, assault, and breach of the peace. Such an act is specially characterised by force and violence — it is done *in invitum*. If the prosecutor on a charge of highway robbery is shown to have connived at it, and to have parted with his goods or money in virtue of an agreement, it cannot be said in legal construction that he was robbed at all, since it is of the essence of robbery that the goods or money be taken against the will of their owner (a). And, again, it is by no means unusual on a trial for a criminal assault that the case for the prosecution breaks down on evidence forthcoming of consent; for consent neutralises as it were the trespass. Yet this reason does not always hold good so * as to exonerate from punishment when applied to an act *prima facie* constituting an assault; for should such act be a breach of the public peace, and so affect and prejudice the public, it may be indictable. For instance, the parties engaged in a prize-fight are indictable for a misdemeanor, and persons present at and sanctioning a prize-fight may, if it terminate fatally, be convicted of manslaughter (b).

II. A criminal act may be indirect, and composite in its nature, containing in itself perhaps no element of force or violence, but characterised by the ingredient of fraud, malice, or negligence. In cases falling within this class we can have little difficulty in discerning the existence of the two qualities of an indictable act above-mentioned. 1st. That it concerns and prejudices the public. 2ndly. That it originated from a guilty mind, or was done with a wrong intent.

1. Fraud, where indictable, is such as directly affects, or is calculated to affect, the public. A fraud by a government official upon the revenue of the country is indictable (c); it is directly levelled at, and exclusively affects the public.

Indictable fraud may prejudice and cause damage to an individual, and at the same time may indirectly affect the public, as being aimed indifferently at

(a) *Per* sir W. Foster, *M'Daniel's Case*, 19 St. Tr. 103.

(b) *R. v. Murphy*, 6 C. & P. 108.

(c) *Bembridge's Case*, 22 St. Tr. 156.

every member of the community chancing to come within its influence; of this species of indictable fraud various instances will hereafter be adduced (*d*).

2. Malice has been defined as “the doing of a wrongful act intentionally, without just cause or excuse” (*e*), or more generally, as “consisting in a conscious violation of the law to the prejudice of another” (*f*). Malice malice; [*43] *accompanying a direct injury may aggravate and intensify it; *ex. gr.*, may raise manslaughter, *i. e.*, felonious homicide, into murder (*g*). Malice may also be a material ingredient, in a criminal act, which, if this ingredient were absent, might be punishable (*h*).

Oftentimes the ingredient of malice is implied and discerned by our law where there is none ostensible and express; proof that an act was done illegally may suffice to show that it was done maliciously. For example, a justice of the peace, acting under the advice of counsel, improperly refused to grant a beer licence. There was no proof that he had been actuated by any malicious intention in refusing it; but, on the contrary, it sufficiently appeared that he had meant to do in the matter what was right. Nevertheless, the act being illegal, was held to be the subject of an indictment (*i*).

If the governor of an island dependent on this crown—though possibly governed by laws differing from those which here prevail—inflict on one brought lawfully into his custody an illegal punishment, or employ illegal means—as the infliction of torture, for extracting a confession, albeit this be done through misapprehension of his powers and misconception of the law, the person so acting may expose himself to a criminal prosecution (*k*), as having “unlawfully and maliciously” done an act oppressive and grievous to the prosecutor.

The existence of a malicious, as of a fraudulent, intention, where not necessarily inferred or implied by law, must be collected by the jury from facts established by the evidence (*l*).

[*44] *3. An act may be criminal and indictable as involving a breach of duty evidenced by negligence; and such breach of duty, may be commissive or permissive—may consist in some sort of misfeasance, or malfeasance, or in nonfeasance (*m*).

It might not be possible to enumerate all legal duties, though they do admit of being classified more or less elaborately by reference to the matters whereto they have relation, and the persons by and to whom respectively they are owing. Perpetually, as new combinations of circumstances present themselves, do

(*d*) *Post*, chap. 13.

(*e*) *Arg. Mitchell v. Jenkins*, 5 B. & Ad. 590.

(*f*) *Per* Lord Campbell, *Ferguson v. Earl of Kinnoull*, 9 Cl. & F. 321.

(*g*) *Post*, chap. 13.

(*h*) *Post*, chap. 14.

(*i*) *R. v. Young*, 1 Burr. 557.

(*k*) *Picton's Case*, 30 St. Tr. 225.

(*l*) At the trial of Sir Samuel Barnardiston on an information for libel (9 St. Tr. 1333, 1349), C. J. Jefferies says, in answer to a remark of counsel for the defendant, that ought to be proved, “How shall any man prove another man's malice, which is a thing that lies only in a man's mind?” “How should it be known that any man is malicious

against the government but by his actions?” And again it has been judicially observed (*Rex v. Dover*, 6 St. Tr. 547) that there are some things which a jury are not to expect evidence of, which it is impossible to know but by the act itself.

(*m*) Nonfeasance is the omitting to do that which there is a legal obligation—or it may be an obligation by contract—to perform. Misfeasance is the doing in an improper manner of that which it was a man's duty to do, or which he had a right to do. Malfeasance is the wrongful or unjustifiable doing of an act which the party had no right to do, or had contracted not to do. Chitty's Gen. Pr. L. I. 9.

legal duties novel to the practitioner become disclosed. Sometimes the legislature by express enactment creates and defines a legal duty owing to the public, or to some section of it; sometimes our customary law, by that inherent power of accommodating itself to new facts which pre-eminently distinguishes it, declares, as it were, such a duty, when an apt occasion arises for so doing. For exemplifying our present subject, it will suffice, however, to specify one ordinary form of breach of duty constituted by negligence. The negligent doing of an act may afford ground for an indictment. Thus, a body corporate will be indictable for negligently executing works entrusted to them to the detriment of the public, the object of the proceeding in such a case being the abatement or suppression of the nuisance (*n*).

Again, by s. 36 of the statute hereafter noticed * concerning malicious injuries to property (*o*), "Whosoever, by any unlawful act, [*45] or by any wilful omission or neglect, shall obstruct, or cause to be obstructed, any engine or carriage using any railway," will be indictable. Here we have exemplified commissive and permissive breach of duty—breach of duty evidenced by an unlawful act, and breach of duty evidenced by wilful omission,—and the reason why such commission or omission is by statute made indictable is this—the breach of duty prejudices the public, or is calculated to do so, and therefore ought to be repressed.

The main ingredients in an indictable act which have been thus concisely touched upon, will be illustrated in the ensuing pages, and to avoid repetition we will here conclude, in the words of a learned writer (*p*), that all treasons and felonies, all misprisions and concealing of treason or felony, all inferior crimes of a public nature, unless summarily punishable; all disturbances of the peace, oppressions, and misdemeanors of a public, evil example, and in violation of the customary law, may be indicted. And that wherever a statute prohibits a matter of public grievance to the liberties and security of the subject, or commands a matter of public convenience, an offender against such statute is punishable by way of indictment, for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by the words or spirit of the enactment.

Classification of indictable offences. Indictable offences are by our customary law subdivided into felonies and misdemeanors.

Definition of felony. Felony, in the general acceptation of English law, comprised every species of crime, which occasioned at common law the forfeiture of lands or goods. (633). This most frequently happened in those

(*n*) See, for instance, *Att.-Gen. v. Sheffield Gas Co.*, 3 De G. M. & G. 304.

(*o*) 24 & 25 Vict. c. 97.

(*p*) Hawk. P. C., Bk. II., chap. 25, s. 4.

(633) In many of the States of the Union, felony, by statute, is construed to mean an offense for which the offender, upon conviction, shall be liable by law to be punished by death, or by imprisonment in a State prison. See *People v. Steenburgh*, 1 Park. 39; *State v. Mayberry*, 48 Me. 218; *Weingorpslin v. The State*, 7 Blackf. (Ind.) 186; *Wilson v. The State*, 1 Wis. 184; *People v. Brigham*, 2 Mich. 550; *Buford v. Com.*, 14 B. Monr. (Ky.) 24. In the absence of a statutory definition, the common-law classification obtains. *Ward v. People*, 3 Hill, 395; *Drennan v. People*, 10 Mich. 169; *The State v. Rohfrisch*, 12 La. Ann. 332; *Adams v. Barrett*, 5 Ga. 404. See *Shay v. People*, 22 N. Y. (8 Smith) 817.

Under the criminal code of Ohio the word *felonious*, though occasionally used, expresses a signification no less vague and indefinite than the word *criminal*. *Mathews v. State*, 4 Ohio St. 542.

[*46] crimes, for which a capital *punishment was liable to be inflicted. Treason itself, says sir Edward Coke (q), was anciently comprised under the name of felony: and in confirmation of this we may observe that the statute of treasons, 25 Edw. 3, st. 5, c. 2, speaking of some dubious crimes, directs a reference to parliament; that it may there be adjudged, "whether they be treason, or other felony." All treasons therefore, strictly speaking, were felonies; though all felonies were not treason. And to this we may add, that not only all capital offences were in some degree or other felony, but that this was likewise the case with some other offences, which were not punished with death; as suicide, and homicide by chance-medley, which were (strictly speaking) felonies, as they subjected the committers of them to forfeitures. So that upon the whole the only adequate definition of felony seems to be that before laid down; viz., an offence which occasioned a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment was formerly in almost every case superadded, according to the degree of guilt.

To explain this matter a little further: the word "felony" or *felonia*, is of undoubted feudal origin, being frequently to be met with in the books of feuds, &c.; but the derivation of it has much puzzled the juridical lexicographers, Prateus, Calvinus, and the rest: some deriving it from the Greek *φῆλος*, an impostor or deceiver; others from the Latin *fallo*, *fefelli*, to countenance which they would have it called *fallonia*. Sir Edward Coke, as his manner is, has given us a still stranger etymology (r); that is *crimen animo felleo perpetratum*, with a bitter or gallish inclination. But all our authentic writers agree in the description, that felony is such a crime as occasioned a forfeiture of the offender's lands or goods. And this gives probability to sir Henry Spelman's Teutonic or German derivation of it (s): in which language

indeed, *as the word is clearly of feudal origin, we ought rather to
[*47] look for its signification, than among the Greeks and Romans. *Fe-lon* then, according to him, is derived from the two northern words: *fet*, which signifies (we well know) the fief, feud, or beneficiary estate: and *lon*, which signifies price or value. Felony is therefore the same as *pretium feudi*, the consideration for which a man gave up his fief; as we say in common speech, such an act is as much as your life, or estate, is worth. Thus it will clearly signify the feudal forfeiture, or act by which an estate was forfeited, or escheated to the lord.

To confirm which we may observe, that it is in this sense, of forfeiture to the lord, that the feudal writers constantly use it. For all those acts, whether of a criminal nature or not, which at this day are generally forfeitures of copyhold estates (t), are styled *felonia* in the feudal law: "*scilicet, per quas feudum amittitur*" (u). As, "*si domino deservire noluerit* (x); *si per annum et diem cessaverit in pretendā investiturā* (y); *si dominum ejuravit, i. e., negavit se a domino feudum habere* (z); *si a domino, in jus eum vocante, ter citatus non comparuerit*" (a); all these, with many others, are still causes of forfeiture in our copyhold estates, and were denominated felonies, by the feudal con-

(q) 3 Inst. 15.
(r) 1 Inst. 391.
(s) Glossar. tit. *Felon*, et vide Ducange,
Gloss. tit. *Fello*.
(t) See vol. ii.

(u) Feud. l. 2, t. 16, in calc.
(x) *Ibid.* l. 1, t. 21.
(y) *Ibid.* l. 2, t. 24.
(z) *Ibid.* l. 2, t. 34, l. 2, t. 26, s. 3.
(a) *Ibid.* l. 2, t. 22.

stitutions. So likewise injuries of a more substantial or criminal nature were denominated felonies, that is, forfeitures: as assaulting or beating the lord (b); vitiating his wife or daughter, "*si dominum cucurbitaverit, i. e. cum uxore ejus concubuerit*" (c); all these were esteemed felonies, and the latter was expressly so denominated, "*si fecerit feloniam, dominum forte cucurbitando*" (d). And as these contempts, or smaller * offences, were felonies, or acts of forfeiture, of course greater crimes, as murder and robbery, fell under the same denomination. [*48] On the other hand, the lord might be guilty of felony, or forfeit his seignory to the vassal, by the same acts as the vassal would have forfeited his feud to the lord. "*Si dominus commisit feloniam, per quam vassallus amitteret feudum si eam commiserit in dominum, feudi proprietatem etiam dominus perdere debet*" (e). One instance given of this sort of felony in the lord is beating the servant of his vassal, so as that he loses his service; which seems merely in the nature of a civil injury, so far as it respects the vassal. And all these felonies were to be determined "*per ludamentum sive judicium parium suorum*" in the lord's court: as with us forfeitures of copyhold lands are presentable by the homage in the court-baron.

Felony, and the act of forfeiture to the lord, being thus synonymous terms in the feudal law, we may easily trace the reason why, upon the introduction of that law into England, those crimes which induced such forfeiture or escheat of lands (and, by a small deflection from the original sense, such as induced the forfeiture of goods also) were denominated felonies. Thus it was said, that suicide, robbery, and rape, were felonies: that is, the consequence of such crimes was forfeiture; till by long use we began to signify by the term of felony the actual crime committed, and not the penal consequence thereof. And upon this system only can we account for the cause, why treason in ancient times was held to be a species of felony: viz. because it induced a forfeiture.

Hence it follows, that capital punishment does by no means enter into the true idea and definition of felony. Felony might have been without inflicting capital punishment, as in the cases of self-murder, and excusable homicide: and capital punishment was formerly inflicted for an offence not felonious; thus heresy by the common * law, of which in the ensuing chapter we shall speak, though capital, never worked any forfeiture [*49] of lands or goods (f), an inseparable incident to felony. And of the same nature was the punishment of standing mute, without pleading to an indictment; which at the common law was capital, but without any forfeiture, and therefore such standing mute was no felony. In short, the true criterion of felony is forfeiture; for, as sir Edward Coke justly observes (g), in all felonies punishable with death, in his time, the offender lost all his lands in fee-simple, and also his goods and chattels; in such as were not so punishable, his goods and chattels only.

The ancient criterion of felony, viz. forfeiture (h), still distinguishes it

(b) *Ibid.* l. 2, t. 24, s. 2.

(c) *Ibid.* l. 1, t. 5.

(d) *Ibid.* l. 2, t. 88; Britton, l. 1, c. 23.

(e) Feud. l. 2, t. 26 and 47.

(f) 3 Inst. 43.

(g) 1 Inst. 391.

(h) This, although the leading, is not the

only characteristic of a felony, it is a rule of the common law of England that a man shall not be allowed to make a felony the foundation of a civil action; to waive the felony and sue for damages. (Judgment, *Stons v. Marsh*, 6 B. & C. 564; *Crosby v. Leng*, 12 East. 413.) A misdemeanor neither causes

from any other indictable offence which is referable to the class of misdemeanors. A misdemeanor is indeed by our common law deemed to be inferior in degree to felony, and the indictment for a felony must set forth that the act charged was done "feloniously," in order that distinct intimation may be given to the accused as to the character of the accusation against him (i). To the unphilosophical distinction between felonies and misdemeanors, a distinction which might, it is conceived, be advantageously abolished, no further reference need here be made. (634)

[* 50]

* CHAPTER V.

OFFENCES AGAINST RELIGION.

In the present chapter we are to enter upon the detail of the several species of crimes, with the punishment annexed to each by the law of England. It was observed, in the beginning of this Book (a), that a crime is a breach and violation of a public right and duty, owing to the whole community, considered as a community, in its social aggregate capacity. And at the very commencement of these Commentaries (b) it was shown, that human laws can have no concern with any but social and relative duties; being intended only to regulate the conduct of man, considered under various relations, as a member of society. All crimes ought therefore to be estimated merely according to the mischiefs which they produce in society (c): and, of consequence, private vices, in breach of mere absolute duties, which a man is bound to perform considered only as an individual, are not, cannot be, the object of any municipal law; any further than as by their evil example, or other pernicious effects, that may prejudice the community, and thereby become public crimes. Thus the vice of drunkenness, if committed privately and alone, is beyond the knowledge and of course beyond the reach of human tribunals: but if committed publicly, in the face of the world, its evil example makes it liable to temporal censure. The vice of lying, which consists (abstractedly taken) in a criminal violation of truth, and therefore in any shape is derogatory from sound morality, is not however taken notice of by our law, unless it carries with it some public inconvenience, as if there be a conspiracy to raise the price of the funds by spreading false news (d), or some social injury, as slander and malicious prosecution, for which a private recompense is given. And yet drunkenness and malevolent lying may *in foro conscientia* be as thoroughly criminal when they are not, as when they are,

a forfeiture nor operates in suspension of a right of action originating out of the matter which is criminal. As to the non-suspension of the civil remedy where felonious homicide has been committed within 9 & 10 Vict. c. 93, s. 1. See *post*, chap. 13.

(i) *Reg. v. Gray*, L. & C. 365, 371.

(a) *Ante*, pp. 3, 4.

(b) *Ante*, vol. i. p. 39.

(c) *Beccar.* ch. 8.

(d) *R. v. Lord Cochrane*, 2 Townsend, St. Tr. 1.

(634) Misdemeanors comprise all offenses lower than felonies, which may be the subject of indictment. *Com. v. Callaghan*, 2 Va. Cas. 460; 1 Whart. Crim. Law, § 3.

attended with public inconvenience. The only difference is, that both public and private vices are subject to the vengeance of eternal justice; and public vices are besides liable to temporal punishment by human tribunals.

On the other hand, there are some offences punishable by the municipal law, which have in themselves nothing criminal, but are made unlawful by the positive constitutions of the state for public convenience. Such as smuggling, shooting game without a certificate, and the like. These are naturally no offences at all; but their whole criminality consists in disobedience to the supreme power, which has an undoubted right, for the well-being and peace of the community, to make some things unlawful, which were in themselves indifferent. Upon the whole, therefore, though some of the offences to be enumerated in the following sheets are offences against the revealed law of God, others against the law of nature, and some are offences against neither; yet in a treatise of municipal law we must consider them all as deriving their particular guilt, here punishable, from the law of man.

Having premised this caution, I shall proceed to distribute the several offences, which are either directly or by consequence injurious to civil society, and therefore punishable by the laws of England, under the following general heads: first, those which are more immediately injurious to religion; secondly, such as violate and * transgress the law of nations; thirdly, such as more especially affect the sovereign [* 52] and the government; fourthly, such as more directly infringe the rights of the public or commonwealth; and, lastly, such as derogate from those rights and duties, which are owing to particular individuals, and in the preservation and vindication of which the community is deeply interested.

First, then, of such crimes as more immediately offend against religion, by openly transgressing its precepts natural or revealed; and mediately, by their bad example and consequence, the law of society also; which constitutes that guilt in the action, which human tribunals have in former, far more frequently than in later times, assumed to censure.

I. Of this species the first to be mentioned is apostasy, or a total renunciation of christianity, by embracing either a false religion, or no religion at all.

Apostasy is now punishable only when brought within the words of a statute presently set forth, and can only take place in such as have once professed the true religion. The perversion of a christian to judaism, paganism, or other false religion, was punished by the emperors Constantius and Julian with confiscation of goods (e); to which the emperors Theodosius and Valentinian added capital punishment, in case the apostate endeavoured to pervert others to the same iniquity (f). A punishment too severe for any temporal laws to inflict upon any spiritual offence: and yet the zeal of our ancestors imported it into this country; for we find by Bracton (g), that in his time apostates were to be burnt to death. Doubtless the preservation of christianity, as a national religion, is, abstracted from its own intrinsic truth, of the utmost consequence to the civil state: which a single instance will sufficiently demonstrate. The belief in a future state * of rewards and punishments, the entertaining just ideas of the moral attributes [* 53]

(e) Cod. 1, 7, 1.

(f) *Ibid.* 6.

(g) L. 3, c. 9.

of the Supreme Being, and a firm persuasion that he superintends and will finally compensate every action in human life (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our Saviour Christ), these constitute the grand foundation of judicial oaths; which call God to witness the truth of those facts, which perhaps may be only known to him and the party attesting: all moral evidence, therefore, all confidence in human veracity, must be weakened by apostasy, and overthrown by total infidelity (*h*). Wherefore affronts to christianity, or endeavours to depreciate its efficacy, in those who have once professed it, have been held deserving of censure. For a long time, indeed, the offence of apostasy was cognisable only by the ecclesiastical courts, which corrected the offender *pro salute animæ*. But about the close of the 17th century, the civil liberties to which we were then restored being used as a cloak of maliciousness, and doctrines subversive of all religion being publicly avowed both in discourse and writings, it was thought necessary for the civil power to interpose, by not admitting those miscreants (*mescroyantz*) to the privileges of society, who maintained such principles as destroyed all moral obligation. To this end it was enacted by statute 9 & 10 Will. 3, c. 32 (*i*), that if any person educated in, or having made profession of, the christian religion, shall by writing, printing, teaching, or advised speaking, deny the christian religion to be true, or the holy scriptures to be of divine authority, he shall upon the first offence be rendered incapable to hold any office or place of trust; and, for the second, be rendered incapable of [* 54] bringing any action, or * of being guardian, executor, legatee, or donee, and shall suffer three years' imprisonment without bail. To give room however for repentance, if, within four months after the first conviction, the delinquent in open court publicly renounces his error, he is discharged for that once from his disabilities.

II. Concerning heresy, although no longer cognisable by courts temporal, a few remarks may not be inappropriate. Heresy consisted, not in a total denial of christianity, but in a denial of some of its essential doctrines, publicly and obstinately avowed; being defined by sir Matthew Hale, "*sententia rerum divinarum humano sensu excogitata, palam docta et pertinaciter defensa* (*k*)."
 II. Heresy. What doctrines were to be adjudged heresy, was left by our old constitution to the determination of the ecclesiastical judge; who had herein a most arbitrary latitude allowed him. For the general definition of a heretic given by Lyndewode (*l*), extends to the smallest deviations from the doctrines of holy church: "*hæreticus est qui dubitat de fide catholica, et qui negligit servare ea, quæ Romana ecclesia statuit, seu servare decreverit*." Or, as the statute 2 Hen. 4, c. 15, expresses it in English, "teachers of erroneous opinions, contrary to the faith and blessed determinations of the holy church." Very contrary this to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness. And what ought to have alleviated the punishment, the uncertainty of the crime, seems to have enhanced it in those days of blind zeal and pious cruelty.

(*h*) *Utiles esse opiniones has, quis negat, cum intelligit, quam multa firmentur jurejurando; quantis salutis sint fœderum religiones; quam multos divini supplicii metus a scelere revocari; quamque sancta sit societas civium inter*

ipso, Diis immortalibus interpositis tum iudicibus, tum testibus? Cic. de Leg. ii. 7.

(*i*) Sect. 1.

(*k*) 1 Hale, P. C. 384.

(*l*) Cap. de Hæreticis.

It is true that the sanctimonious hypocrisy of the canonists went at first no further than enjoining penance, excommunication, and ecclesiastical deprivation, for heresy; though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation of goods *in pios usus*. They prevailed also upon the weakness of bigoted princes, * to render the civil power [* 55] subservient to their purposes, by making heresy not only a temporal, but even a capital offence; the Romish ecclesiastics determining, without appeal, whatever they pleased to be heresy, and shifting off to the secular arm the odium and drudgery of executions, with which they themselves were too tender and delicate to intermeddle. Nay, they pretended to intercede and pray, on behalf of the convicted heretic, *ut citra mortis periculum sententia circa eum moderatur* (m): well knowing at the same time that they were delivering the unhappy victim to certain death. Hence the capital punishments inflicted on the ancient Donatists and Manichæans by the Emperors Theodosius and Justinian (n): hence also the constitution of the Emperor Frederic mentioned by Lyndewode (o); adjudging all persons without distinction to be burnt with fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution (p), ordained that if any temporal lord, when admonished by the church, should neglect to clear his territories of heretics within a year, it should be lawful for good catholics to seize and occupy the lands, and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power, so long claimed and so fatally exerted by the pope, of disposing even of the kingdoms of refractory princes to more dutiful sons of the church. The immediate event of this constitution was something singular, and may serve to illustrate at once the gratitude of the holy see, and the just punishment of the royal bigot: for upon the authority of this very constitution, the pope afterwards expelled the Emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou (q).

Christianity being thus deformed by the demon of persecution upon the continent, we cannot expect that our *own island should be entirely free from the same scourge. And accordingly we find among our [* 56] ancient precedents (r) a writ *de hæretico comburendo*, which is thought by some to be as ancient as the common law itself. However it appears from thence, that the conviction of heresy by the common law was not in any petty ecclesiastical court, but before the archbishop himself in a provincial synod; and that the delinquent was delivered over to the temporal power: so that the crown had a control over the spiritual power, and might pardon the convict by issuing no process against him; the writ *de hæretico comburendo* being not a writ of course, but issuing only by the special direction of the sovereign in council (s).

But in the reign of Henry the Fourth, when the eyes of the christian world began to open, and the seeds of the protestant religion (though under the opprobrious name of Lollardy (t)), took root in this kingdom, the clergy, emboldened by the king's dubious title to amend an increase of their own power,

(m) Decretal. l. 5, t. 40, c. 27.

(n) Cod. l. 1, tit. 5.

(o) Cap. de Hæreticis.

(p) Cod. l. 5, 4.

(q) Baldus in Cod. l. 5, 4.

(r) F. N. B. 269.

(s) 1 Hale, P. C. 395.

(t) So called, not from *lolium*, or tares, (an etymology which was afterwards devised in order to justify the burning of them, Matth. xiii. 30,) but from one Walter Lollard, a German reformer A. D. 1315. Mod. Univ. Hist. xxvi. 18; Spelm. Gloss. 371. Ducange, Gloss. *ad verb. Lollardi*.

obtained an act of parliament (*u*), which sharpened the edge of persecution to its utmost keenness. For, by that statute, the diocesan alone, without the intervention of a synod, might convict of heretical tenets; and unless the convict abjured his opinions, or if after abjuration he relapsed, the sheriff was bound *ex officio*, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. By the statute 2 Hen. 5, c. 7, Lollardy was afterward made a temporal offence, and indictable in the king's courts; which did not thereby gain an exclusive jurisdiction, but one concurrent with the bishop's consistory.

Afterwards, when the final reformation of religion *began to [* 57] advance, the power of the ecclesiastics was somewhat moderated: for though what heresy is, was not then precisely defined, we are told in some points what it is not: the statute 25 Hen. 8, c. 14, declaring offences against the see of Rome not to be heresy; and the ordinary being thereby restrained from proceeding in any case upon mere suspicion; that is, unless the party were accused by two credible witnesses, or an indictment of heresy were first found in the courts of common law. And yet the spirit of persecution was not then abated, but only diverted into a lay channel. For in six years afterwards, by statute 31 Hen. 8, c. 14, the bloody law of the six articles was made, which established the six most contested points of popery, transubstantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession; which points were "determined and resolved by the most godly study, pain, and travail of his majesty: for which his most humble and obedient subjects, the lords spiritual and temporal, and the commons, in parliament assembled, did not only render and give unto his highness their most high and hearty thanks," but did also enact and declare all oppugners of the first to be heretics, and to be burnt with fire; and of the five last to be felons, and to suffer death. The same statute established a new and mixed jurisdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on destroying the supremacy of the bishops of Rome, and establishing all other their corruptions of the christian religion.

I shall not perplex this detail with the various repeals and revivals of these sanguinary laws in the two succeeding reigns; but shall proceed directly to the reign of Queen Elizabeth; when the reformation was finally established. By statute 1 Eliz. c. 1, all former enactments relating to heresy were repealed, the jurisdiction as to heresy being left as it stood at common law; viz., as [* 58] *regarded the infliction of common censures, in the ecclesiastical courts; and, in case of burning the heretic, in the provincial synod only (*x*). Sir Matthew Hale is indeed of a different opinion, and holds that such power resided in the diocesan also, though he agrees, that in either case the writ *de hæretico comburendo* was not demandable of common right, but grantable or otherwise merely at the discretion of the crown (*y*). The principal point, however, now gained was, that by this statute a boundary was for the first time set to what should be accounted heresy; nothing for the future being to be so determined, but only such tenets, which had been theretofore so declared: 1. By the words of the canonical scriptures; 2. By the first

(*u*) 2 Hen. 4, c. 15.

(*x*) *The Case of Heresy*, 5 Rep. 28; *Writ de hæretico comburendo*, 12 Rep. 92.

(*y*) 1 Hale, P. C. 405.

four general councils, or such others as had only used the words of the holy scriptures; or, 3. Which should thereafter be so declared by parliament, with the assent of the clergy in convocation. Thus was heresy reduced to a greater certainty than before; though it might not have been the worse to have defined it in terms still more precise and particular: as a man continued still liable to be burnt, for what perhaps he did not understand to be heresy until the ecclesiastical judge so interpreted the words of the canonical scriptures.

For the writ *de hæretico comburendo* remained still in force; and we have instances of its being put in execution upon two anabaptists in the seventeenth of Elizabeth, and upon two Arians in the ninth of James I. But it was totally abolished, and heresy again subjected only to ecclesiastical correction *pro salute animæ*, by virtue of the statute 29 Car. 2, c. 9. For in one and the same reign, our lands were delivered from the slavery of military tenures (z), our bodies from arbitrary imprisonment on criminal charges by the *habeas corpus* act (a), and our minds in some measure from the tyranny of superstitious * bigotry, by demolishing this horrible and especial [* 59] badge of persecution in the English law.

From this period heresy was dispunishable by our law, until the legislature thought proper that the civil magistrate should again interpose, with regard to a species of it, at one time prevalent; for the statute 9 & 10 Will. 3, c. 32 (b), enacted that if any person educated in the christian religion, or professing the same, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the holy Trinity to be God, or maintain that there are more gods than one, he shall undergo the same penalties and incapacities, which were just now mentioned to be inflicted on apostasy by the same statute. But this enactment, so far as it affected persons denying the holy Trinity, was repealed by the 53 Geo. 3, c. 160, s. 2 (c).

III. Of laws against catholics and protestant dissenters the most penal and obnoxious have, since the latter part of the seventeenth century, been gradually mitigated and repealed, so that dissent from the doctrines and ordinances of our established church has ceased to be in any degree punishable or penal, provided that certain statutory requirements, by no means stringent in their nature, be complied with. It will be unnecessary, therefore, to exhibit in minute detail the long course of legislation in reference to nonconformists; a brief allusion to some especial portions of it may suffice.

The penal statutes formerly enacted in regard to Roman catholics must be accounted for by the urgency of the times at which they originated. The restless machinations of the Jesuits during the reign of Elizabeth, the turbulence and uneasiness of the papists under the new religious establishment, and the boldness of their hopes and wishes for the succession of the Queen of Scots, * induced the parliament to counteract so dangerous a spirit by [* 60] severely penal laws. The powder-treason, in the succeeding reign, struck a panic into James I., which operated in different ways: it occasioned the enacting of new laws against the papists, but deterred him from putting

(z) 12 Car. 2, c. 24.

(a) 31 Car. 2, c. 2.

(b) Sect. 1.

(c) See *R. v. Waddington*, 1 B. & C. 26; *R. v. Carlile*, 3 B. & Ald. 161.

them in execution. The intrigues of Queen Henrietta in the reign of Charles I., the prospect of a popish successor in that of Charles II., the assassination-plot in the reign of King William, and the avowed claim of a popish pretender to the crown in that and subsequent reigns, will account for the infliction of such penalties at those several periods of our history.

In order the better to secure the church of England—re-established on the accession of Queen Elizabeth by the Acts of Supremacy and Uniformity (*d*)—against perils from nonconformists, jews, catholics, and other sectaries, two bulwarks were during the reign of Charles II. erected. By the Corporation Act (*e*), no person could be legally elected to any office relating to the government of any city or corporation, unless, within a twelvemonth previously, he had received the sacrament of the Lord's Supper according to the rites of the church of England; he was also enjoined to take the oaths of allegiance and supremacy at the same time that he took the oath of office: and, in default of either of these requisites, such election was avoided. By the Test Act (*f*), all officers, civil and military, were directed to take the oaths, and make the declaration against transubstantiation, in any of the courts at Westminster, or at the quarter sessions, within six calendar months after their admission; and also within the same time to receive the sacrament of the Lord's Supper, [** 61*] according to the usage of the church of * England, in some public church immediately after divine service, to deliver into court a certificate thereof signed by the minister and churchwarden, and also to prove the same by two credible witnesses; upon forfeiture of 500*l.* and disability to hold the said office.

These enactments necessarily excluded as well catholic as protestant nonconformists from civil and military offices, and their operation was afterwards extended by the statutes below cited (*g*).

The penal laws directed against papists might formerly have been divided into three classes: 1. Those which concerned lay persons professing popery; 2. Those which concerned popish recusants convict; and, 3. Those which concerned popish priests. 1. Persons professing the popish religion, besides being subject to penalties for not frequenting their parish church, were disabled from taking land either by descent or purchase, after eighteen years of age, until they renounced their errors: they were required at the age of twenty-one to register their estates, and all future conveyances and wills relating to them; they were incapable of presenting to any advowson, or granting to any other person any avoidance of the same; they could not keep or teach any school under pain of perpetual imprisonment; and if they said or heard mass, they incurred pecuniary penalties and imprisonment. Moreover, if any person sent another abroad to be educated in the popish religion, or to reside in any religious house abroad for that purpose, or contributed to his maintenance when there; the sender, the sent, and the contributor, were each disabled to sue in law or equity, to be executor or administrator to any person, to take any legacy or deed of gift, and to bear any office in the realm, and incurred a forfeiture

(*d*) 1 Eliz. cc. 1 & 2. The clause (sect. 14) in the latter act rendering compulsory attendance at the parish church, and similar clauses of the 8 Jac. 1, cc. 1 & 4, were repealed by the 7 & 8 Vict. c. 102, and 9 & 10 Vict. c. 59.

(*e*) Stat. 13 Car. 2, st. 2, c. 1.

(*f*) Stat. 25 Car. 2, c. 2, explained by 9 Geo. 2, c. 26.

(*g*) 1 Geo. 1, st. 2, c. 18; 2 Geo. 2, c. 81; 9 Geo. 2, c. 26.

of goods and chattels, and of real estate for life. And where these errors were aggravated by apostasy, or perversion, where a person was himself reconciled, or procured others to be * reconciled, to the see of Rome, the offence [* 62] amounted to high treason. 2. Popish recusants, convicted in a court of law of not attending the service of the church of England, were subject to the following disabilities, penalties, and forfeitures, over and above those before mentioned. They were considered as persons excommunicated; they could hold no office or employment; they were forbidden to keep arms in their houses, and the same, if kept there, might be seized by justices of the peace; they could not come within ten miles of London, on pain of 100*l.*; they could bring no action at law, or suit in equity; they were not permitted to travel above five miles from home, unless by licence, upon pain of forfeiting their goods; and they might not come to court under pain of 100*l.* No marriage or burial of such recusant, or baptism of his child, could be had otherwise than by the ministers of the church of England, under other severe penalties. A married woman, when recusant, forfeited two-thirds of her dower or jointure, could not be executrix or administratrix to her husband, nor have any part of his goods; and during the coverture might be kept in prison, unless her husband redeemed her at the rate of 10*l.* a month, or the third part of all his lands. And, lastly, as a feme-covert recusant might be imprisoned, so all others must, within three months after conviction, either have submitted and renounced their errors, or, if required so to do by four justices, must have abjured and renounced the realm: and if they did not depart, or if they returned without licence from the crown, they incurred the guilt of felony, and were liable to incur death as felons. There was also an inferior species of recusancy, (refusing to make the declaration against popery, enjoined by statute 30 Car. 2, st. 2, when tendered by the proper magistrate,) which, if the party resided within ten miles of London, made him an absolute recusant convict; or, if at a greater distance, suspended him from having any seat in parliament, keeping arms in his house, or any horse above the value * of [* 63] five pounds. This was the state, by the laws once in being (*h*), of a lay papist. But, 3. Popish priests were in a still more dangerous condition. For by statute 11 & 12 Will. 3, c. 4, popish priests or bishops, celebrating mass, or exercising any part of their functions in England, except in the houses of ambassadors, were liable to perpetual imprisonment. And by the statute 27 Eliz. c. 2, any popish priest, born in the dominions of the crown of England, who should come over hither from beyond sea (unless driven by stress of weather, and tarrying only a reasonable time (*i*)), or should be in England three days without conforming and taking the oaths, was guilty of high treason: and all persons harbouring him were guilty of felony, and were capitally punishable.

This is a short summary of the laws formerly in force against the papists, under their three several classes, of persons professing the popish religion, popish recusants convict, and popish priests. Concerning which the President Montesquieu observed (*k*), that they were so rigorous, though not pro-

(*h*) Stats. 28 Eliz. c. 1; 27 Eliz. c. 2; 29 Eliz. c. 6; 35 Eliz. c. 2; 1 Jac. 1, c. 4; 3 Jac. 1, cc. 4 & 5; 7 Jac. 1, c. 6; 3 Car. 1, c. 8; 25 Car. 2, c. 2; 30 Car. 2, st. 2; 1 W. & M. cc. 9, 15, and 26; 11 & 12 Will. 3, c. 4; 12 Ann. st. 2, c. 14; 1 Geo. 1, st. 2, c. 55; 3 Geo. 1, c. 18; 11 Geo. 2, c. 17.
 (*i*) Raym. 377; Latch, 1.
 (*k*) Sp. L. b. 19, c. 27.

fessedly of the sanguinary kind, that they did all the hurt that could possibly be done in cold blood; though in answer to this it may be observed that these laws were seldom exerted to their utmost rigour.

The penal enactments above referred to have, however, by various statutes passed during the preceding and the present century, been mitigated or repealed; they were in part mitigated by statute 18 Geo. 3, c. 60, with regard to such papists as duly took the oath therein prescribed, of allegiance, abjuration of the Pretender, renunciation of the pope's civil power, and abhorrence of the doctrines of destroying and not keeping faith with heretics, and

[* 64] * deposing or murdering princes excommunicated by authority of the see of Rome: in respect of whom only the statute 11 & 12 Will-3, c. 4, was repealed—so far as it disabled them from purchasing or inheriting, or authorised the apprehending or prosecuting the popish clergy, or subjected to perpetual imprisonment either them or any teachers of youth.

Further, by the statute 31 Geo. 3, c. 32 (amended and explained by the 43 Geo. 3, c. 30), many of the severe restrictions and penalties already enumerated, were removed from the Roman catholics who were willing to comply with the requisitions of that statute;—that they must appear at one of the courts at Westminster, or at the quarter-sessions held for the county, city, or place of their residence, and make and subscribe a declaration, that they professed the Roman catholic religion, and also an oath similar to that required by the 18 Geo. 3, c. 60, and by 43 Geo. 3, c. 30, Roman catholics, taking the oath, and making the declaration prescribed by 31 Geo. 3, c. 32, became entitled to all the benefits given by 11 Geo. 3, c. 60, as fully as if they had taken the oath therein prescribed. On this declaration and oath being duly made by any Roman catholic, the officer of the court was directed to grant him a certificate! and such officer was required to transmit yearly to the privy council lists of all persons who had thus qualified themselves in his court within the year. The 31 Geo. 3, c. 32, then provided (*l*), that a Roman catholic, thus qualified, should not be prosecuted under any statute for not repairing to a parish church, nor for being a papist, nor for attending at or performing a mass or other ceremonies of the church of Rome, in a place for such worship duly certified (*m*). But the statute requires that no such place of assembly shall have its doors locked or barred during the time of meeting or divine worship (*n*).

[* 65] If any Roman catholic be elected constable, * church-warden, overseer, or into any parochial office, he is permitted to execute the same by deputy (*o*); and, lastly, it is by this statute further enacted, that if any person disturb a congregation allowed under the act, he shall be bound over to the next sessions, and, upon conviction there, shall forfeit 20*l*. (*p*).

Great progress towards an entire toleration of persons professing the catholic religion having been made by the above recited enactments, almost all the remaining civil disabilities attaching to them were removed by the 10 Geo. 4, c. 7. By which they are empowered to vote at elections for members of parliament, and to sit in both houses of parliament (*q*). They may hold offices and preferments of all kinds, except the office of regent of the United

(*l*) Sect. 4.

(*m*) Sect. 5.

(*n*) Sect. 6.

(*o*) Sect. 7.

(*p*) Sect. 10.

(*q*) Sect. 5.

Kingdom, lord chancellor, lord keeper or lord commissioner of the seal of Great Britain or Ireland (*r*), * lord lieutenant or lord deputy of Ire- [* 66] land, or lord commissioner of the assembly of the church of Scotland (*s*), and except any office in the church, or ecclesiastical courts or foundations, universities, colleges, or schools (*t*).

By subsequent sections of the same act, provision is made for the suppression of the order of Jesuits, and members of other religious orders of the church of Rome, within the United Kingdom (*u*). They are subject, on coming into the realm, to banishment for life (*x*); but any protestant secretary of state may grant a licence to any Jesuit to come into the United Kingdom, subject to its revocation at pleasure, and to his being ordered to depart, on neglect of which order he is equally subject to banishment (*y*). So, the becoming a Jesuit or member of any such religious order within any part of the United Kingdom, subjects the offender to banishment (*z*). And after having been sentenced to banishment for any offence under the act, the offender, on being found at large without lawful cause, after the end of three calendar months from the time of such sentence, is liable to be transported for life (*a*). These provisions however do not extend to any religious order consisting of females (*b*).

We will merely add that still further concessions have been made in favour of the catholic subjects of the crown by various recent statutes (*c*).

* To protestant dissenters aggrieved by the Test and Corporation [* 67] Acts (*d*), and by other severe enactments (*e*), the legislature, imme-

(*r*) But now, by statute 30 & 31 Vict. c. 75, s. 1:—

Every subject of her Majesty shall be eligible to hold the office of lord chancellor of Ireland or lord keeper or lord commissioner of the great seal in Ireland, without reference to his religious belief, on taking and subscribing the oath therein set forth, and also any other oath or declaration of office not involving any religious test which now is or from time to time may be required to be taken by the holder of the said office. By sect. 2, in case the said office shall be held by any person not being a member of the established church, the right of presentation to any ecclesiastical benefice belonging to such office shall, while the office is so held, devolve upon and be exercised by such person as her Majesty by sign manual may appoint to exercise the same, and in default of such appointment the right of such presentation shall devolve upon and be exercised by the archbishop of Armagh; also by sect. 3, in case such office shall at any time be held by a person not a member of the established church, the jurisdiction of nominating delegates to hear appeals from the ecclesiastical courts in Ireland, and of hearing applications for and issuing commissions of review to reconsider the decisions of such courts of delegates, shall, while the office is so held as aforesaid, be exercised by such one of the chief judges of the courts of chancery or common law in Ireland, being a member of the established church, as her Majesty shall by sign manual from time to time appoint to exercise the same; and such chief judge shall also, while the office is so held as aforesaid, act in place of the lord chancellor as

trustee or member of any charity or of any board or institution of which the lord chancellor is now an *ex officio* trustee or member, and which has for its object the exclusive benefit of, or the administration of endowments or funds for the exclusive benefit of, members of the established church, or of which it is now required by law that such trustee or member shall belong to the established church.

(*s*) Sect. 12.

(*t*) Sect. 16.

(*u*) See also stat. 23 & 34 Vict. c. 184, s. 7.

(*x*) Sect. 29.

(*y*) Sect. 30.

(*z*) Sect. 34.

(*a*) Sect. 36.

(*b*) Sect. 37.

(*c*) By stat. 2 & 3 Will. 4, c. 115, s. 1, Roman catholics are made subject to the same laws as protestant dissenters with respect to schools and places of worship. By stats. 7 & 8 Vict. c. 102, and 9 & 10 Vict. c. 59, very many penal enactments against catholics are repealed; and the statute 14 & 15 Vict. c. 60, an act to prevent the assumption by her Majesty's Roman catholic subjects of ecclesiastical titles in respect of places in the United Kingdom, and inflicting a pecuniary penalty for every offence against the act, has been suffered to remain a dead letter. See 10 Geo. 4, c. 7, s. 24.

(*d*) *Ante*, p. 60.

(*e*) In the reign of Charles II. various oppressive statutes were enacted against dissenters—the Act of Uniformity, 13 & 14 Car. 2, c. 4; The Five Mile Act, 17 Car. 2, c. 2; The Conventicle Acts, 16 Car. 2, c. 4; 22 Car. 2, c. 1.

diately after the revolution, extended indulgence by greatly mitigating the disabilities and restrictions under which they had previously laboured. The penalties imposed upon them by the statutes below cited (*f*), were conditionally suspended by the statute 1 Will. & M. st. 1, c. 18, "for exempting their majesties' protestant subjects, dissenting from the church of England, from the penalties of certain laws,"—commonly called the Toleration Act (which was confirmed by the 10 Anne, c. 2); this statute, *inter alia*, required that protestant nonconformists, in order to entitle themselves to the benefits conferred by it, should, 1, take the oaths of allegiance and supremacy (or make a similar affirmation, being quakers), and subscribe the declaration against popery; 2, should repair to some congregation registered as specified in the act; 3, that the doors of the meeting-house in which they assemble should be unlocked, unbarred, and unbolted; in default of which the persons meeting there were still liable to the penalties of the former acts. This statute enacted also that if any person should wilfully, maliciously, or contemptuously disturb any congregation, assembled in any church or permitted meeting-house, or should misuse any preacher or teacher there, he should be bound over to the sessions of the peace, and forfeit 20*l*. The Toleration Act likewise exempted dissenting teachers from the statutory penalties previously imposed on them—

[* 68] conditionally, on *their observance of certain requirements, and it further enacted (*g*) that if any person dissenting from the church of England be appointed to the office of constable, church-warden, overseer of the poor, or other parochial office, and shall scruple to take upon him the said office in regard of anything required by law to be done in respect thereof, he might execute such office by deputy.

By statute 52 Geo. 3, c. 155 (*h*), the free exercise of religion was in some important particulars (*i*) yet further permitted to protestant nonconformists,

[* 69] and at length the *obnoxious provisions of the Test and Corporation Acts, so far as they related to the imposing of a sacramental test and to the infliction of penalties for not taking it, were repealed by the statute 9

(*f*) 28 Eliz. c. 1; 29 Eliz. c. 6; 35 Eliz. c. 1; 22 Car. 2, c. 1.

(*g*) Sect. 7.

(*h*) Repealing the 13 & 14 Car. 2, c. 1; 17 Car. 2, c. 2; and 22 Car. 2, c. 1.

(*i*) By sect. 1 of this act, all places of religious worship of protestants must be certified to the bishop of the diocese, or the archdeacon of the archdeaconry, or to the justices at the general or quarter sessions, and shall be also registered, and a penalty to the amount of 20*l*. and not less than 20*s*. may be inflicted for permitting meetings in places not so certified or registered. [As to registering dissenting places of worship, see further the stats. 18 & 19 Vict. cc. 81 & 86.] And by sect. 4, every person teaching or preaching at, or being in, such place so certified, is exempted from penalties, as a person who has taken the oath, and made the declaration prescribed by the 1 W. & M. st. 1, c. 18, or any act amending the same. By sect. 5, every one preaching or teaching at such place so certified, shall, when required by a magistrate, take and subscribe the oath and declaration specified in the 19 Geo. 3, c. 44; and if he refuse to take it, he must not

teach or preach, under a penalty not exceeding 10*l*. nor less than 10*s*.; but he need not go more than five miles from his place of residence to take such oath. And by sect. 6, such person may compel a justice to administer such oath to him, and to attest his subscription to such declaration, and give him a certificate thereof. By sect. 11, no place of public meeting for religious worship must have the doors fastened, so as to prevent persons entering therein during the time of such meeting, under a pecuniary penalty to the teacher. By stat. 5 Geo. 1, c. 4, it had been enacted that no mayor or principal magistrate should, subject to certain penal consequences, appear at any dissenting meeting with the ensigns of his office, but by stat. 30 & 31 Vict. c. 75, sect. 4, "Every person holding any judicial or civil or corporate office may attend and be present at any place of public meeting for religious worship in England, Ireland, or Scotland in the robe, gown, or other peculiar habit of his office, or with the ensign or insignia of or belonging to the same, without incurring any forfeiture of office or penalty for such attendance."

Geo. 4, c. 17, which has itself been since supplemented by various very liberal enactments, framed to prevent the exclusion from corporate and other offices of protestant nonconformists on the ground of their religious convictions (*k*).

IV. The fourth species of offence falling within the limits of our present enquiry, is blasphemy against the Almighty, by denying his being or providence; or by contumelious reproaches of our Saviour. **IV. Blasphemy.** Christ (*l*). (635) Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or corporal punishment (*m*): for christianity is part of the laws of England (*n*).

V. Another offence against religion consists in reviling the ordinances of the church. By statutes 1 Edw. 6, c. 1, and 1 Eliz. c. 1 (*o*), it is provided, that whoever reviles the sacrament of the Lord's Supper shall be punished by * fine and imprisonment; and by the 1 Eliz. c. 2, if any [* 70] **V. Reviling ordinances of church.** minister speak anything in derogation of the book of common prayer, he is punishable by imprisonment and deprivation. And if any person whatsoever in plays, songs, or other open words, speak anything in derogation, depraving, or despising of the said book, or forcibly prevent the reading of it, or cause any other service to be used in its stead, he will render himself liable to fine, forfeiture, and imprisonment. But this statute, so far as it related to Roman catholics, was repealed by the 31 Geo. 3, c. 32, s. 3.

VI. Somewhat allied to the two preceding offences, though inferior in degree, is that of profane and common swearing and cursing. By the last **VI. Profane swearing.** statute against which, 19 Geo. 2, c. 21 (*p*), repealing all former enactments upon the subject, every labourer profanely cursing or swearing shall forfeit 1s.; every other person under the degree of a gentle-

(*k*) By the 30 & 31 Vict. c. 62—reciting that by various acts a certain declaration against transubstantiation, the invocation of saints, and the sacrifice of the mass is required to be made, and subscribed by the subjects of her Majesty for the enjoyment of certain civil offices, franchises, and rights:—it is enacted that all such parts of the said acts as render the said declaration a necessary qualification for the exercise of any such office, franchise, or right shall be repealed (*s*. 1). But nothing in the act contained shall be construed to enable any person professing the Roman catholic religion to exercise or enjoy any civil office, franchise, or right for

the exercise or enjoyment of which the taking, making, or subscribing the declaration by this act abolished is now by law a necessary qualification, or any other civil office, franchise, or right from which he is now by law excluded (*s*. 2). See also the following statutes, 29 & 30 Vict. c. 22; 9 & 10 Vict. c. 59.

(*l*) *R. v. Waddington*, 1 B. & C. 26; *Reg. v. Mozon*, 1 Townsend's St. Tr. 356.

(*m*) 1 Hawk. P. C. 7.

(*n*) *Per Best, J.*, 1 B. & C. 29.

(*o*) Sect. 14.

(*p*) As to which, see *Reg. v. Scott*, 33 L. J. M. C. 15.

(635) Every act done maliciously, tending to bring religion into contempt, may be punished at common law. *Lindenmuller v. The People*, 38 Barb. 548; S. C., 21 How. 156. Thus blasphemy against God, and contumelious reproaches, and profane ridicule of Christ or the Holy Scriptures, are offenses punishable at the common law, whether uttered by words or writings. *People v. Ruggles*, 8 Johns. 290; *Updegraph v. Com.*, 11 Serg. & R. (Penn.) 394; *Com. v. Kneeland*, 20 Pick. (Mass.) 206. Such offenses are held to be indictable as tending to sap the foundations of Christianity, and to disturb the peace and corrupt the morals of the community. *Ib.* And see *State v. Chandler*, 2 Harr. (Del.) 553; *State v. Jones*, 9 Ired. (N. C.) 88; *State v. Kirby*, 1 Murph. (Tenn.) 254; *State v. Ellar*, 1 Dev. (N. C.) 267.

Intoxication is no excuse on an indictment for blasphemy. It only aggravates the offense. *People v. Porter*, 2 Park. 14.

man, 2s.; and every gentleman or person of superior rank, 5s. to the poor of the parish; and, on a second conviction, double; and, for every subsequent offence, treble the sum first forfeited; with all charges of conviction: and in default of payment may be sent to the house of correction for ten days. Any justice of the peace may convict upon his own hearing, or the testimony of one witness; and any constable or peace officer, upon his own hearing, may secure any offender and carry him before a justice, and there convict him (g). (636)

VII. A seventh offence against religion, of which our ancient books are full, viz., witchcraft, conjuration, enchantment, or sorcery, has become entirely obsolete; indeed it has been expressly enacted by statute 9 Geo. 2, c. 5 (r), that no prosecution shall for the future be *carried on against any person for such supposed offence; but by the 5 Geo. 4, c. 8, s. 4, persons pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose upon any of her majesty's subjects, shall be deemed rogues and vagabonds, and be subject to a year's imprisonment and hard labour.

VIII. An eighth species of offenders in this class may include religious impostors: persons who falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert religion, by bringing it into ridicule and contempt, are punishable by the temporal courts with fine, imprisonment, and corporal punishment (s).

IX. Profanation of the Lord's day constitutes a ninth offence against religion, punished by the municipal law of England. (637) For, besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day, in a country professing christianity, and the corruption of morals which must follow its profanation, the

(g) The conviction however must be within eight days after the offence, sect. 12. (r) Sect. 8. (s) 1 Hawk. P. C. 7.

(636) Profane swearing is a species of blasphemy, and is an indictable nuisance at the common law. *State v. Graham*, 3 Sneed (Tenn.), 184; *State v. Ellar*, 1 Dev. (N. C.) 267. *State v. Kirby*, 1 Murphy (N. C.), 254. So the statutes of many of the States have special provisions making blasphemy and profaneness criminal. *Id.* And see *The State v. Jones*, 9 Ired. (N. C.) 88; *State v. Chandler*, 2 Harr. (Del.) 553; *Com. v. Kneeland*, 20 Pick. (Mass.) 206; *Odell v. Garnett*, 4 Blackf. (Ind.) 549; *Holcomb v. Cornish*, 8 Conn. 375; *Updegraph v. Com.*, 11 Serg. & R. (Penn.) 894.

(637) To perform unnecessarily any secular labors on the Lord's day, or Christian Sabbath, in such a way as to disturb the worship of others, has been held indictable at common law. *Com. v. Irandell*, 2 Grant (Penn.), 506; *Lindenmuller v. People*, 33 Barb. 548; 8 C., 21 How. 156. But see *State v. Brooksbank*, 6 Ired. (N. C.) 78. Practically this question is of little importance, as in the United States generally the violation of the Lord's day is made punishable by statute. And the constitutionality of such statutory provisions has been sustained by the courts. See *Specht v. Com.*, 8 Barr (Penn.), 312; *Shaver v. The State*, 5 Eng. (Ark.) 259; *Voglesong v. State*, 9 Ind. 112; *Folts v. State*, 83 id. 215; *Lindenmuller v. People*, 33 Barb. 548; *Com. v. Colton*, 8 Gray (Mass.), 488; *State v. Amba*, 20 Mo. 214; *Ex parte Bird*, 19 Cal. 180; *Ex parte Andrews*, 18 id. 678; *Matter of Granger*, 7 Phila. (Penn.) 350.

keeping one day in seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to the state, considered merely as a civil institution. It humanizes the manners of the lower classes; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness: it imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any stated times of recalling them to the worship of their Maker. And therefore the laws of king Athelstan forbid all merchandizing on the Lord's day, under * very severe penalties. And by the statute 27

Hen. 6, c. 5, no fair or market shall be held on the principal festivals, [* 72] Good Friday, or any Sunday (except the four Sundays in harvest), on pain of forfeiting the goods exposed to sale. And since, by the statute 1 Car. 1, c. 1 (t), no persons shall assemble out of their own parishes, for any sport whatsoever upon this day; nor, in their parishes, shall use any bull or bear-baiting, interludes, plays, or other unlawful exercises, or pastimes; on pain that every offender shall pay 3s. 4d. to the poor. This statute does not prohibit, but rather impliedly allows to persons, any innocent recreation or amusement, within their respective parishes, even on the Lord's day, after divine service is over. But by statute 29 Car. 2, c. 7 (u), no person (x) is allowed to work on the Lord's day, or use any boat or barge, or expose any goods to sale; except meat (y) in public houses, milk at certain hours, and works of necessity or charity, on forfeiture of 5s. Nor shall any drover, carrier, or the like, travel upon that day, under a penalty of 20s. (z). (638)

* X. Lastly, any person who is guilty of riotous, violent, or indecent behaviour in church, or in any place of religious worship duly [* 73]

X. Indecent behav- certified under 18 & 19 Vict. c. 81, whether during the celebra-
viour in church. tion of divine service or at any other time, or in any churchyard
or burial ground, or who shall molest the clergyman or minister, is liable to fine and imprisonment (a).

(t) See 26 & 27 Vict. c. 125.

(u) A person can commit but one offence against this statute on the same day. *Orepps v. Durden*, 1 Smith, L. C. 6th ed. 666.

(x) A farmer is not within the statute, *Reg. v. Silvester*, 33 L. J. M. C. 79.

(y) Mackerel also may be sold on Sundays before and after divine service; 10 & 11 Will. 3, c. 24. As to the sale of liquors on Sunday, see 18 & 19 Vict. c. 118; 23 Vict. c. 27; 11 & 12 Vict. c. 49; 3 & 4 Vict. c. 61.

See as to the making and selling of bread within the city of London and liberties thereof, and the weekly bills of mortality, 3 Geo. 4, c. 106; without those limits, 6 & 7 Will. 4, c. 37.

As to killing game on Sunday, see 1 & 2 Will. 4, c. 82, s. 3. The 21 Geo. 3, c. 49, was passed to restrain an indecent practice, which had become prevalent in London and West-

minster; it enacts, that if any house, room, or place is opened upon a Sunday for any public entertainment, or for debating upon any subject whatever, to which persons are admitted by money or tickets, the keeper of it shall forfeit 200l., the manager or president 100l., and the receiver of the money or tickets 50l.; and every person advertising, or printing an advertisement of such a meeting, shall forfeit 50l. for every offence, to any person who will prosecute.

(s) By the 8 Car. 1, c. 1, no carrier with any horse, nor waggonman with any waggon, nor carrier with any cart, nor drover with any cattle, shall travel on Sunday, on pain of 20s.

(a) 23 & 24 Vict. c. 82, s. 2. See 1 Mar. sess. 2, c. 3, ss. 2-4. See also stat. 52 Geo. 3, c. 155, s. 12.

(638) As to what constitutes works of necessity or charity, excepted from the various statutes punishing Sabbath desecration, see *McClary v. Lowell*, 44 Vt. 116; *Com. v. Jacobus*, 1 Leg. Gaz. Rep. (Penn.) 491; *Crockett v. State*, 38 Ind. 416; *Morris v. State*, 31 id. 189; *Myers v. State*, 1 Conn. 503; *Com. v. Knox*, 16 Mass. 76; *Murray v. Com.*, 24 Penn. St. 270; *State v. Goff*, 20 Ark. 298.

[*74]

* CHAPTER VI.

OFFENCES AGAINST THE LAW OF NATIONS.

ACCORDING to the method marked out in the preceding chapter, we are next to consider offences more immediately repugnant to that universal law of society, which regulates the mutual intercourse between one state and another; or, at all events, such of them as are particularly animadverted on by the English law. (639)

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilised inhabitants of the world (*a*); General observations. in order to decide disputes, to regulate ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each of them (*b*). This general law is founded upon the principle—that different nations ought in time of peace to do one another all the good they can; and in time of war as little harm as possible, without prejudice to their own real interests (*c*). And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice, in which the learned of every nation agree; or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, [*75] but the law * of nature and reason, being the only one with which the contracting parties are equally conversant, and to which they are equally subject.

In arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom: without which it must cease to be a part of the civilised world. Thus in mercantile questions, such as bills of exchange and the like: in marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law-merchant (*d*), which is a branch of the law of nations, is regularly and constantly adhered to. And whensoever international questions yet more momentous arise, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.

(a) Dig. l. 1, §.

(b) *Ante*, vol. i. p. 38.

(c) Montesq. *Sp. L.* b. 1, c. 7.

(d) *Ante*, vol. i. p. 74.

(639) In the United States jurisdiction over such offenses is vested in the federal courts.

But, though in civil transactions and questions of property between the subjects of different states, the law of nations, as adopted by the law of England, has much scope and extent, yet the present branch of our inquiries will fall within a narrow compass, since an offence against the law of nations can rarely be the object of the criminal law of any particular state. For offences against this law are principally incident to the whole states or nations; in which case recourse can only be had to war; which is an appeal * to the God of hosts, to punish such infractions of public faith, as are [* 76] committed by one independent people against another: neither state having any superior jurisdiction to resort to upon earth for justice. But where the individuals of any state violate this general law, it is then the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is therefore incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender, by the state to which he belongs; and, if that be refused or neglected, the sovereign avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.

The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds: 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy. (640)

I. As to the first, violation of safe-conducts (e) or passports, expressly granted by the crown or its ambassadors (f) to the subjects of a foreign power in time of mutual war; or committing acts of hostility against such as are in amity, league, or truce with us, and are here under a general implied safe-conduct: these are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: and any such offence may, according to the writers upon the law of nations, constitute a just ground of war; since it is not in the power of the foreign * prince to cause justice to be done to his subjects by the very individual delinquent, but he [* 77] must require it of the whole community. And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the sovereign and the law: and, more especially, as it is one of the articles of *magna carta*, that foreign merchants should be entitled to safe-conduct and security throughout the kingdom: there is no question but that any violation of either the person or property of such foreigner may be punished

I. Violation of safe-conducts or passports.

(e) As to which see Phill. Intern. L. III. 146, et seq. (f) See vol. i. p. 809.

(640) Any conduct in one of our citizens, or in a foreigner within our borders, tending to involve our government in difficulty with a foreign power, is an offense for which an indictment can be maintained. Of this nature are endeavors to excite a revolt against a government at peace with ours; and such, also, in a time of war between our government and another, are the violation of safe conducts or passports given under authority of ours to an enemy. See 1 Bish. Crim. Law, § 484. See, also, Act of Congress, April 30, 1790, § 28.

by indictment in the name of the sovereign, whose honour is more particularly engaged in supporting his own safe-conduct (*g*).

II. As to the rights of ambassadors, which are also established by the law of nations, and are therefore matter of universal concern, they have formerly been treated of (*h*). It may here be sufficient to remark, that the common law of England recognizes them in their full extent, by immediately stopping legal process sued out through the ignorance or rashness of individuals, which may trench upon the immunities of a foreign minister or any of his train. And, the more effectually to enforce the law of nations in this respect, when violated through wantonness or insolence, severe penalties have been attached to any breach of it by the statute law (*i*). (641)

III. Lastly, the crime of piracy (*k*), or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to sir Edward Coke (*l*), *hostis humani generis*. As therefore he has renounced the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against mankind, mankind must declare war against him; so that every community has a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to inflict, for an invasion of his person or property. (642)

(*g*) "The grantor of the safe conduct tacitly pledges himself to protect the grantee and to punish any person subject to his command, who may violate it," Phill. Intern. L. iii. 147. Several ancient statutes upon the above subject are repealed by 26 & 27 Vict. c. 125.

(*h*) *Ante*, vol. i. p. 801.

(*i*) *Ante*, vol. i. p. 804.

(*k*) See *R. v. Golding*, 12 St. Tr. 1270.

(*l*) 3 Inst. 118.

(641) See *ante*, vol. i, note 82. Ambassadors and their attendants are exempted from all responsibility to our laws for crimes committed by them. See *Schooner Ex. v. McFaddon*, 7 Cranch, 116; *Respublica v. De Longchamps*, 1 Dall. 111; *The State v. De La Foret*, 2 Nott & McCord (S. C.), 217. And this exemption is held to protect the ambassador while coming, remaining, and going; and also to extend to one not sent to us, but passing through our territory, on his way to or from another country. See *Dupont v. Pichon*, 4 Dall. 321; 1 Kent's Com. 38.

If any person shall in any manner infract the law of nations by offering violence to the person of an ambassador or other public minister, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court. 1 Bright. Dig. 41; 1 Stat. at Large, 117, § 28. It is held to be no defense, upon an indictment under this provision, that the defendant was ignorant of the public character of the minister. *U. S. v. Liddle*, 4 Wash. C. C. 209; *U. S. v. Ortega*, id. 531.

The only remedy for the misbehavior of an ambassador is to discharge him and send him home. See 1 Kent's Com. 38, 39; 1 Bish. Crim. Law, § 126.

(642) By the law of nations a pirate is one who roves the sea in an armed vessel, without a commission from any State, upon his own authority, for the purpose of seizing by force and appropriating any vessel he may meet. *United States v. Baker*, 5 Black. C. C. 6. And see *Davison v. Seal-skins*, 2 Paine, 324; *United States v. Smith*, 5 Wheat. 153.

In the United States, piracy is punishable only in the federal courts, and under a statute enacted by congress. See Acts of Congress, April 30, 1790, chap. 9, § 8; Act March 3, 1819, chap. 76, § 5; Act May 15, 1820, chap. 118, § 3; Act August 8, 1848, chap. 98, § 5; Act

By the ancient common law, piracy, if committed by a subject, was held to be a species of treason, being contrary to his natural allegiance; and by an alien to be felony only: but, since the statute of treason, 25 Edw. 3, st. 5, c. 2, it was held to be only felony in a subject (*m*). Formerly it was only cognisable by the admiralty courts, the proceedings in which were mainly regulated by the rules of the civil law (*n*). But it being inconsistent with the liberties of the nation, that any man's life should be taken away, unless by the judgment of his peers, or the common law of the land, the statute 28 Hen. 8, c. 15, established a new jurisdiction for this purpose, proceeding according to the course of the common law, of which we shall say more hereafter.

The offence of piracy, at common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there (*o*). But, by statute, some other offences are made piracy also: as by statute 11 & 12 Will. 3, c. 7 (*p*), if any natural born subject commits any act of hostility upon the high seas, against others of her majesty's subjects, under colour of a commission from any foreign power; this, though it would only be an act * of war in an alien, shall be [* 79] construed piracy in a subject. And further, any commander, or other seafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition, or goods; or yielding them up voluntarily to a pirate; or conspiring to do these acts; or any person assaulting the commander of a vessel to hinder him from fighting in defence of his ship, or confining him, or making or endeavouring to make a revolt on board; shall, for each of these offences, be adjudged a pirate, felon, and robber. (643) By the statute 8 Geo. 1, c. 24 (*q*), the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any wise consulting, combining, confederating, or corresponding with them: or the forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard, shall be deemed piracy. Also, by statute 18 Geo. 2, c. 30, any natural born subject, or denizen, who in time of war shall commit hostilities at sea against any of his fellow-subjects, or shall assist an enemy on that element, is liable to be tried and convicted as

(*m*) 3 Inst. 113.
 (*n*) 1 Hawk. P. C. 98.
 (*o*) 1 Hawk. P. C. 100. Piracy at common law seems now to be punishable in like manner as if the act had been done upon land. Russ. Cr. 4th ed. i. 147 n.
 (*p*) Several sections of which enactments (*viz.*, ss. 1—6, 13 and 15) are repealed by 80 & 81 Vict. c. 59.
 (*q*) Made perpetual by 2 Geo. 2, c. 28, s. 7, and see 80 & 81 Vict. c. 59.

March 3, 1847, chap. 51; Act August 5, 1861, chap. 48. The act of 1820 makes the slave trade piracy.

Robbery on the high seas is piracy by the act of congress, as well as by the law of nations. See *United States v. Smith*, 5 Wheat. 158; *United States v. Brig Malek Adhel*, 2 How. 210.

(648) No commands from a superior officer will justify a subordinate in the commission of what the latter knows to be piracy. *United States v. Jones*, 8 Wash. C. C. 209.

A confederacy by citizens of this country, whether on land or on board of an American ship, with such as are sea-robbers or pirates by the law of nations or the yielding of a vessel by a citizen to them, is within the provisions of the act of April 30, 1790, chap. 9, § 8. So, also, any intercourse with pirates calculated to promote their views, or an endeavor by a mariner to corrupt the master so as to induce him to go over to them. *United States v. Howard*, 8 Wash. C. C. 840.

a pirate, and by the statute 7 Will. 4 & 1 Vict. c. 88, s. 2, whosoever with intent to commit or at the time of or immediately before or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault with intent to murder any person being on board of or belonging to it, or shall stab, cut, or wound any such person or unlawfully do any act by which his life may be endangered, shall be guilty of felony, and shall be sentenced to suffer death, which sentence however may be recorded (*r*).

[* 80] * It seems always to have been considered, that if any of the crew or passengers of a vessel were taken for the purpose of being sold as slaves, this was piracy at common law (*s*). And by the statute 5 Geo. 4, c. 113, it is expressly enacted (*s*. 9), that any subject of the sovereign or any person residing or being in any of the dominions of the crown, or on the high seas (which is further extended, by the 6 & 7 Vict. c. 98, s. 1, to British subjects wheresoever residing and being, and whether within the dominions of the British crown or of any foreign country,) who shall convey or remove any person as a slave, shall be guilty of piracy, felony, and robbery (*t*). By sect. 10, the dealing for, purchasing or bartering persons as slaves, or fitting out or navigating any ship for this purpose, or in any way being connected with the traffic in slaves, is likewise made felonious; and by sect. 11, the embarking on board of any vessel as a petty officer or seaman, knowing that such vessel is to be employed in the traffic in slaves, is constituted a misdemeanor (*u*). Treaties have also been entered into, under the authority of parliament, with many foreign nations and states, for extending similar enactments to the ships and subjects of those countries (*x*).

These are the principal cases, in which the statute law of England interposes to aid and enforce the law of nations, as a part of the common law: by inflicting punishment upon offences against that law, committed by private persons. We shall proceed in the next two chapters to consider offences which more immediately affect the sovereign and the government.

(*r*) 4 Geo. 4, c. 48, s. 1. The ordinary punishment of piracy under the statute law is penal servitude for life or any term not less than five years, or imprisonment with or without hard labour for not more than two years, 7 Will. 4 & 1 Vict. c. 88, ss. 3, 4; 16 & 17 Vict. c. 99, s. 4; 20 & 21 Vict. c. 3, s. 2; 27 & 28 Vict. c. 47.

(*s*) Molloy, 68, s. 16.

(*t*) As to the punishment for the above offence, see 1 Vict. c. 91, s. 1; 16 & 17 Vict. c. 99, s. 4; 20 & 21 Vict. c. 3, s. 2; 27 & 28 Vict. c. 47.

(*u*) See also the 3 & 4 Will. 4, c. 78, and 6 & 7 Vict. c. 98.

(*x*) See the stat. 1 & 2 Vict. c. 103, continued by several subsequent acts.

* CHAPTER VII.

[* 81]

OFFENCES AGAINST THE SOVEREIGN.

THE third general division of crimes consists of such, as more especially affect the supreme executive power,—which amount to either a total renunciation of allegiance, or at the least to a criminal neglect of that duty, which is due from every subject to the sovereign and the government.

We have already (*a*) had occasion to mention the nature of allegiance, as the tie or *ligamen* which binds every subject to be true and faithful to his sovereign liege lord, in return for that protection which is afforded him; and truth and faith to bear of life and limb, and earthly honour; and not to know or hear of any ill intended against his sovereign, without defending him therefrom. And this allegiance, we may remember, was distinguished into two species: the one natural and perpetual, which is inherent only in natives, or natural born subjects of the crown; the other local and temporary, which is incident to aliens. Every offence more immediately affecting the royal person, the regal crown or dignity, is in some degree a breach of this duty of allegiance, whether natural and innate, or local and acquired by residence: and such offences may be referred to two classes; 1st. Treason, and other offences, misprisions and contempts against the sovereign; and, 2ndly. Offences against the government.

I. Treason, in its very name (which is borrowed from the French) imports a betraying, treachery, or breach of faith. * It therefore happens only between allies, saith the Mirror (*b*): treason indeed was formerly made use of by the law as a general appellation, to denote not only an offence against the sovereign, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation: and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance; as to destroy the life of any such superior or lord (*c*). This was looked upon as proceeding from the same principle of treachery in private life, as would have urged him who harbours it to have conspired in public against his liege lord and sovereign; and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary: these, being breaches of the lower allegiance, of private and domestic faith, were formerly denominated *petit* treasons. (644) But when disloyalty so reared its crest, as to attack even majesty itself, it was called by way of eminent distinction high treason, *alta proditio*; being equivalent to the *crimen læsae majestatis* of the Romans, as Glanvil (*d*) denominates it also in our English law. [* 82]

As this is the highest civil crime, which (considered as a member of the community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of high treason be indeterminate, this

(*a*) Vol. i., chap. 10.

(*b*) C. i., s. 7.

(*c*) Leg. Aelfredi. c. 4; Aethelst. c. 4; Canuti, c. 58.

(*d*) L. i., c. 2.

(644) The offense of *petit* treason is not recognized in the United States, and it ceased to be known in England in 1828.

alone (says Montesquieu) is sufficient to make a government degenerate into arbitrary power (e). And yet, by the ancient common law, there was a great latitude left in the breast of the judges to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and [* 83] * arbitrary construction, offences to the degree of treason which never had been suspected to be such. Thus the accroaching, or attempting to exercise, royal power (a very uncertain charge) was in the 21 Edw. 3 held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he paid him 90*l.* (f): a crime, it must be owned, well deserving of punishment; but which seems to be of a complexion very different from that of treason. Killing the father, or brother, or even the messenger, of the sovereign, has also fallen under the same denomination (g), the doctrine applied in the latter case being almost as tyrannical as that of the imperial constitution of Arcadius and Honorius, which determined that any attempts or designs against the ministers of the prince should be treason (h). To prevent, however, the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. 3, st. 5, c. 2, was made; which defines what offences only for the future should be held to be treason: in like manner as the *lex Julia majestatis* among the Romans promulged by Augustus Cæsar, comprehended all the ancient laws, that had before been enacted to punish transgressors against the state (i). (645) This statute must therefore be our text and guide, in order to examine into the sev-

(e) Sp. L. b. 12, c. 7.

(f) 1 Hale, P. C. 83.

(g) Britt. c. 22; 1 Hawk. P. C. 84.

(h) *Qui de nece virorum illustrium, qui consiliis et consistorio nostro intersunt, senatorum etiam (nam et ipsi pars corporis nostri sunt), vel cujuslibet postremo, qui militat nobiscum,*

cogitaverit: (eodem enim sceleris voluntatem sceleris, quod effectum, puniri jura voluerunt) ipse quidem, utpote majestatis reus, gladio feriat, bonis ejus omnibus fisco nostro addictis. (Cod. 9, 8, 5.)

(i) Gravin. Orig. 1, s. 84.

(645) In this country treason is either against the United States or a particular State. "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." U. S. Const., art. 3, § 3, cl. 1.

In most of the States of the Union treason against the State is defined in substantially the same language; and the same amount of evidence is made necessary to a conviction. See 3 Greenl. Ev., § 237, and note See, as to New York, *People v. Lynch*, 11 Johns. 549.

Congress has power to declare the punishment of treason, "but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted." U. S. Const., art. 3, § 3. Accordingly it is provided by statute that "if any person or persons owing allegiance to the United States of America shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death." Act of Congress, April 30, 1790, ch. 9, § 1; 1 U. S. Stat. at Large, p. 112. The same statute contains a provision making misprision of treason punishable. See *id.*, § 2.

As it regards the punishment of treason it is further provided that "every person who shall hereafter commit the crime of treason against the United States, and shall be adjudged guilty thereof, shall suffer death, and all his slaves, if any, shall be declared and made free; or, at the discretion of the court, he shall be imprisoned for not less than five years, and fined not less than ten thousand dollars, and all his slaves, if any, shall be declared and

eral species of high treason. And we shall proceed to expound *seriatim* the several clauses of it, so far as they relate to and define existing treasons.

made free; said fine shall be levied and collected on any or all of the property, real and personal, including slaves, of which the said person so convicted was the owner at the time of committing the said crime, any sale or conveyance to the contrary notwithstanding." Act of Congress, July 17, 1862, § 1; 12 U. S. Stat. at Large, chap. 105, p. 589. The second section of the same act provides for the punishment of persons aiding rebellion against the government, and section third provides that "every person guilty of either of the offenses described in the act shall be forever incapable and disqualified to hold any office under the United States."

As to the punishment for enlisting persons to serve against the United States, and for seditious conspiracy, etc., see Act of Congress, July 31, 1861; 13 U. S. Stat. at Large, chap. 33, p. 284.

Correspondence with rebels by citizens abroad is punishable by Act of Congress, February 25, 1863; 13 U. S. Stat. at Large, chap. 60, p. 696.

As to conspiracies, see Act of March 2, 1867.

Under the act of congress of 1790, a person to be guilty of treason must owe allegiance to the United States. And allegiance is of two kinds; that due from citizens, and that due from aliens resident within the United States. Every sojourner who enjoys our protection is bound in good faith toward our government; and although an alien he may be guilty of treason by co-operation either with rebels or foreign enemies. The allegiance of aliens is local, and terminates when they leave our country. That of citizens is not so limited. 23 Law Rep. 705. And see *U. S. v. Wiltberger*, 5 Wheat. 76, 97; *U. S. v. Villato*, 2 Dall. 370; 2 Bish. Crim. Law, § 1235; *Carlisle v. United States*, 8 Alb. Law J. 63.

The meaning of the term "levying war," as used in the constitution of the United States, has been thus expounded: "The settled interpretation is, that the words 'levying war' include not only the act of making war, for the purpose of entirely overturning the government, but also any combination forcibly to oppose the execution of any public law of the United States, if accompanied or followed by an act of forcible opposition to such law, in pursuance of such combination. The following elements, therefore, constitute this offense: 1st. A combination or conspiracy by which different individuals are united in one common purpose. 2d. This purpose being to prevent the execution of some public law of the United States by force. 3d. The actual use of force by such combination to prevent the execution of such law. It is not enough that the purpose of the combination is to oppose the execution of a law in some particular case, and in that only." CURTIS, J., 4 Law Rep. 413, 414. And see *United States v. Vigol*, 2 Dall. 346; *United States v. Mitchell*, id. 348; *United States v. Burr*, 4 Cranch, 481; *Ex parte Bollman*, id. 75, 126; Charge of SPRAGUE, J., 23 Law Rep. 705; Charge of SMALLEY, J., id. 597. In the case of the *United States v. Hanway*, 2 Wall. Jr. 144, it was virtually held that to make the armed resistance to a public law treason, the intention must be to overthrow the government of the United States. And see *United States v. Hoxie*, 1 Paine's C. C. 265.

As to what amounts "to adhering to and giving aid and comfort to our enemies," it is somewhat difficult in all cases to define; but certain it is that furnishing them with arms or munitions of war, vessels, or other means of transportation, or any materials which will aid the traitors in carrying out their traitorous purposes, with a knowledge that they are intended for such purposes, or inciting or encouraging others to engage in or aid the traitors in any way, does come within the provisions of the act. And it is immaterial whether such acts are induced by sympathy with the rebellion, hostility to the government, or a desire for gain. Charge of SMALLEY, J., 23 Law Rep. 597, 601. And see *United States v. Pryor*, 3 Wash. C. C. 234.

If war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy are to be considered as traitors. *Ex parte Bollman*, 4 Cranch, 75, 126. See *United States v. Greathouse*, 2 Abb. N. S. 364.

In treason there are no accessories. They who in felony would be such are in treason principal offenders. See *ante*, 35, note 19. And see *United States v. Hanway*, 2 Wall. Jr. 139, 195; *Anonymous*, Dalison, 16.

1. "When a man doth compass or imagine the death of our lord the king, of our lady his queen, or of their * eldest son and heir."

1. Compassing, &c., death of king, queen, or heir. [* 84] Under this description it is held that a queen regent (such as Queen Elizabeth, Queen Anne, and her present most gracious Majesty Queen Victoria) is within the words of the act, being invested with royal power, and entitled to the allegiance of her subjects (*k*); but the husband of such a queen is not comprised within these words, and therefore no treason can be committed against him (*l*). The king here intended is the king in possession, without any respect to his title: for it is held that a king *de facto* and not *de jure*, or, in other words, an usurper who has got possession of the throne, is a king within the meaning of the statute: as there is a temporary allegiance due to him, for his administration of the government, and temporary protection of the public: and accordingly treasons committed against Henry VI. were punished under Edward IV., though all the line of Lancaster had been previously declared usurpers by act of parliament. But the most rightful heir of the crown, or king *de jour* and not *de facto*, who has never had plenary possession of the throne, as was the case of the house of York during the three reigns of the line of Lancaster, is not a king within this statute against whom treasons may be committed (*m*). And a very sensible writer on the crown-law lays such stress on the point of possession as to hold (*n*), that a king out of possession is so far from having any right to our allegiance, by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him. A doctrine which he grounds upon the statute 11 Hen. 7, c. 1, which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture, who do assist and obey a king *de facto*. But, in truth, this seems to be confounding all notions of right and wrong; and the consequence would be, that when [* 85] * Cromwell had put to death the elder Charles, and assumed the power (though not the name) of king, the people were bound in duty to hinder the son's restoration: and were some foreign potentate to invade this kingdom, and by any means get possession of the crown (a term, by the way, of very loose and indistinct signification), the subject would be bound by his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of Henry VII. does by no means command any opposition to a king *de jure*; but excuses the obedience paid to a king *de facto*. When therefore an usurper is in possession, the subject is excused and justified in obeying and giving him assistance: otherwise, under an usurpation, no man could be safe: if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience. Nay, further, as the mass of people are imperfect judges of title, of which in all cases possession is *prima facie* evidence, the law compels no man to yield obedience to that prince, whose right is by want of possession rendered uncertain and disputable, till Providence shall think fit to interpose in his favour, and decide the ambiguous claim: and therefore, till he is entitled to such allegiance by possession, no treason can be committed against him. Lastly, a king who has resigned his crown, such resignation being admitted and ratified in parliament, is accord-

(*k*) 1 Hale, P. C. 101.

(*l*) 3 Inst. 7; 1 Hale, P. C. 106.

(*m*) 3 Inst. 7, 1 Hale, P. C. 104.

(*n*) 1 Hawk. P. C. 36.

ing to sir Matthew Hale no longer the object of treason (*o*). And the same reason holds, in case a king abdicates the government: or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution: since, as was formerly observed (*p*), when the fact of abdication is once established, and determined by the proper judges, the consequence necessarily follows, that the throne is thereby vacant, and he is no longer king.

* Let us next see, what is a "compassing" or "imagining" the death of the sovereign, &c. These are synonymous terms; the word [* 86]

What is a compassing or imagining death. "compass" signifying the purpose or design of the mind or will (*q*), and not, as in common speech, the carrying such design into effect (*r*). And therefore an accidental stroke, which may mortally wound the sovereign, *per infortunium*, without any traitorous intent, is no treason: as was the case of sir Walter Tyrrel, by the command of king William Rufus, shooting at a hart, whose arrow glanced against a tree, and killed the king upon the spot (*s*). But, as this compassing or imagination is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open, or overt act (*t*). And yet the tyrant Dionysius is recorded (*u*) to have executed a subject, barely for dreaming that he had killed him; which was held for a sufficient proof, that he had thought thereof in his waking hours. Such however is not the temper of the English law; and therefore in this, and the three next species of treason, it is necessary that there appear an open or overt act of a more full and explicit nature to convict the traitor upon. The statute expressly requires, that the accused "be thereof upon sufficient proof attainted of some open act by men of his own * condition (*x*)."
Thus, to provide weapons or ammunition for the purpose of killing the king, has been held to be a palpable overt act of treason in imagining his death (*y*). To conspire to imprison the king by force, and move towards it by assembling company, is an overt act of compassing the king's death (*z*); for all force, used to the person of the sovereign, in its consequence may tend to his death, and is a strong presumption of something worse intended than the present force, by such as have so far thrown off their bounden duty to their sovereign; it being an old observation, that there is generally but a short interval between the prisons and the graves of princes. There is no question also, but that taking any measures to render such treasonable purposes effectual, as assembling and consulting on the means to kill the sovereign, is a sufficient overt act of high treason (*a*). [* 87]

(*o*) 1 Hale, P. C. 104.

(*p*) *Ante*, vol. i. p. 248.

(*q*) According to our ancient law, "compassing" or intending the death of any man, demonstrated by some evident fact, was equally penal as homicide itself: 3 Inst. 5.

(*r*) 1 Hale, P. C. 107.

(*s*) 3 Inst. 6.

(*t*) In the proceedings against the regicides (5 St. Tr. 947), the indictment charged, that they did traitorously compass and imagine the death of the king, the taking off his head was laid as an overt act of compassing, and the person who was supposed to have given the stroke was convicted on the indictment. For the compassing is considered as the treason, the overt acts as the means made use of

to effectuate the intentions of the heart. And in every indictment for this species of treason, and indeed for levying war, or adhering to the king's enemies, an overt act must be alleged and proved. For the overt act is the charge, to which the prisoner must apply his defence. Foist. 194.

(*u*) Plutarch. in vit.

(*x*) "*De ceo provablement soit atteint de overt faite per gens de leur condition.*"

(*y*) 3 Inst. 12.

(*z*) 1 Hale, P. C. 109.

(*a*) 1 Hawk. P. C. 83; 1 Hale, P. C. 119.

"In the case of the king the statute of treasons has, with great propriety, retained the rule *voluntas pro facto*. The principle upon which this is founded is too obvious to need

[* 88] * How far mere words, spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. Instances are reported (b) of persons who have been executed for treasonable words. But now it seems clearly to be agreed, that by the common law and the statute of Edw. 3 words spoken amount *per se* only to a high misdemeanor, and no treason. For they may be spoken in heat, without any intention, or be mistaken, perverted, or misremembered by the hearers; their meaning depends always on their connection with other words, and things; they may signify differently even according to the tone of voice with which they are delivered; and sometimes silence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to high treason. And accordingly in 4 Car. 1, on a reference to the judges, concerning some words spoken by one Pine, they certified to the king, "that though the words were as wicked as might be, yet they were no treason: for unless it be by some particular statute, no words will be treason (c)." If the words be set down in writing, it * argues more deliberate intention: and, according to the maxim *scribere est agere*, such writing, though unpublished, has in some arbitrary reigns convicted its author of treason: particularly in the cases of one Peacham, a clergyman, for treasonable passages in a sermon never preached (d); and of Algernon Sidney, for some papers found in his closet; which, had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtless, though unpublished, have been properly read in evidence to explain overt acts of treason, laid in the indictment (e). But being merely

much enlargement. The king is considered as the head of the body-politic, and the members of that body are considered as united and kept together by a political union with him and with each other. His life cannot, in the ordinary course of things, be taken away by treasonable practices, without involving a whole nation in blood and confusion; consequently every stroke levelled at his person is, in the ordinary course of things, levelled at the public tranquillity. The law therefore tendereth the safety of the king with an anxious concern; and, if I may use the expression, with a concern bordering upon jealousy. It considereth the wicked imaginations of the heart, in the same degree of guilt as if carried into actual execution, from the moment measures appear to have been taken to render them effectual. And, therefore, if conspirators meet and consult how to kill the king, though they do not then fall upon any scheme for that purpose, this is an overt act of compassing his death; and so are all means made use of, be it advice, persuasion, or command, to incite or encourage others to commit the fact, or join in the attempt; and every person who but assenteth to any overture for that purpose will be involved in the same guilt.

"The care the law hath taken for the personal safety of the king is not confined to actions or attempts of the more flagitious kind, to assassination or poison, or other attempts directly and immediately aiming at

his life. It is extended to every thing wilfully and deliberately done or attempted, whereby his life may be endangered. And, therefore, the entering into measures for deposing or imprisoning him, or to get his person into the power of the conspirators,—these offences are overt acts of treason within this branch of the statute." Fost. 194.

This was the species of treason with which the state-prisoners were charged in 1794. And the question, as stated by the court for the jury to try, was, whether their measures had been entered into with an intent to subvert the monarchy and to depose the king? See *R. v. Hardy*, 24 St. Tr. 199, 1879—80.

(b) See, for example, *Houghton's Case*, Cro. Car. 125; *Challorcomb's Case*, *Id. ibid.*; 1 Hale, P. C. 115.

(c) *Pine's Case*, Cro. Car. 117, 126.

This subject is ably discussed by Mr. J. Foster, who maintains that words alone cannot amount to an overt act of treason: but if they are attended or followed by a consultation meeting, or any act, then they will be evidence, or a confession, of the intent of such consultation, meeting or act; and he concludes, that "loose words, not relative to facts, are at the worst no more than bare indications of the malignity of the heart." Fost. 202, *et seq.*—Words spoken may however be laid in an indictment for treason to explain an overt act charged therein.

(d) Cro. Car. 125; 2 St. Tr. 869.

(e) Foster, 198.

speculative, without any intention (so far as appeared) of making public use of them, the convicting the authors of treason upon such an insufficient foundation has been universally disapproved. Peacham, indeed, was pardoned; and though Sidney was executed, yet it was to the general discontent of the nation; and his attainder was afterwards reversed by parliament. There was then no manner of doubt, but that the publication of such a treasonable writing was a sufficient overt act of treason at the common law (*f*); and such is the recognised doctrine at this day.

2. The second species of treason is, "if a man do violate the king's companion, or the king's eldest daughter, unmarried, or the wife of the king's eldest son and heir." By the king's companion is meant his wife; and by violation is understood carnal knowledge, as well without force, as with it: and this is high treason in both parties, if both be consenting; as some of the wives of Henry the Eighth by fatal experience evinced.

3. The third species of treason is, "if a man do levy * war against our lord the king in his realm." And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances whether real or pretended (*g*). For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power, for these purposes, in the high court of parliament: neither does the constitution justify any private or particular resistance for private or particular grievances; though in cases of national oppression the nation has very justifiably risen as one man, to vindicate the original contract, subsisting between the sovereign and the people. To resist the royal forces by defending a castle against them, is a levying of war: and so is an insurrection with an avowed design to pull down all inclosures, all brothels, and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the authority of the crown (*h*). But a tumult, with a view to pull down a particular house, or lay open a particular inclosure, amounts at most to a riot; this being no general defiance of public government (*i*). So, if two subjects quarrel *and levy war against each other (in that spirit of private war, which prevailed over Europe (*k*) in the early feudal times), it is only a great

(*f*) 1 Hale, P. C. 118; 1 Hawk. P. C. 38.

(*g*) 1 Hawk. P. C. 37. Lord Mansfield declared, upon the trial of Lord George Gordon, that it was the unanimous opinion of the court, that an attempt, by intimidation and violence, to force the repeal of a law, was a levying war against the king, and high treason. *R. v. Gordon*, Doug. 590.

(*h*) 1 Hale, P. C. 132. In *Reg. v. O'Brien*, 1 Townsend, St. Tr. 469, 526, the case was thus presented to the jury:—Was the object of this insurrectionary movement a general object, or was it a limited particular personal object to protect the accused? To reduce the offence below the crime of treason, the personal or particular object must be exclusive; because, if in addition to protecting the person from arrest there was the other and gen-

eral purpose, the moment the general object is established that becomes high treason, whether such general object were a change in the government, a repeal of the Act of Union or the separation of Ireland from Great Britain.

(*i*) "There must be an insurrection, it must be accompanied with force, and it must be for an object of a general nature." Therefore if an armed body enter a town with a leader, their object being neither to take the town nor to attack the military, but merely to make a demonstration of strength to procure the liberation of certain political prisoners, this, though an aggravated misdemeanor, is not high treason. *Reg. v. Frost*, 9 C. & P. 129; 1 Townsend, St. Tr. 1, 95.

(*k*) Robertson Charles V. i. 45, 286.

riot and contempt, and no treason. Thus it happened between the Earls of Hereford and Gloucester in 20 Edw. 1 who raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the loss of many lives: yet this was held to be no treason, but only a great misdemeanor (*l*). A bare conspiracy to levy war does not amount to this species of treason: but (if particularly pointed at the person of the sovereign or at the government) it falls within the first, of compassing or imagining the king's death (*m*).

4. "If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere," he is also declared guilty of high treason. This must likewise be proved by some overt act, as by ^{4. Adhering to king's enemies.} giving them intelligence (*n*), sending them provisions, by selling them arms, by treacherously surrendering a fortress or the like (*o*). By enemies are here understood the subjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our [* 92] coasts, without any open hostilities between * their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the giving them any assistance is also clearly treason; either in the light of adhering to the public enemies of the crown and kingdom (*p*), or else in that of levying war against her majesty. And, most indisputably, the same acts of adherence or aid, which (when applied to foreign enemies) will constitute treason under this branch of the statute, will (when afforded to our own fellow-subjects in actual rebellion at home) amount to high treason under the description of levying war against the crown (*q*). But to relieve a rebel, fled out of the kingdom, is no treason: for the statute is taken strictly, and a rebel is not an enemy: an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England (*r*). And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies in the kingdom, provided he leaves them whenever he has a safe opportunity (*s*). (646)

(*l*) 1 Hale, P. C. 136.

(*m*) 3 Inst. 9; Foster, 211, 213.

(*n*) Sending intelligence to the enemy of the destinations and designs of this kingdom, in order to assist them in their operations against us, or in defence of themselves, is high treason, although such correspondence should be intercepted; *Hensley's Case*, 1 Burr. 650, 19 St. Tr. 1341. In *R. v. Stone*, 25 St. Tr. 1155; 6 T. R. 527, it was held, that sending a paper to the enemy, though it was

afterwards intercepted, containing advice not to invade this country, if sent with the intention of assisting their councils in their conduct and in the prosecution of the war, was high treason.

(*o*) 3 Inst. 10.

(*p*) Foster, 219.

(*q*) *Ibid.* 216.

(*r*) 1 Hawk. P. C. 38.

(*s*) Foster, 216.

(646) See *ante*, 29, note 620. And see *United States v. Hodges*, 2 Wheel. Cr. Cas. 477; *United States v. Vigol*, 2 Dall. 347. It is held by the court of claims that serving in a home guard (*Miller's Case*, 4 Ct. of Cl. 288; *Ayer's Case*, *id.* 429); or serving in a fire patrol liable to be called into military service (*Quinby's Case*, *id.* 417); or paying duties on goods running the blockade (*id.*); or subscribing to the confederation (*Padelford's Case*, 4 Ct. of Cl. 316), when done under compulsion, or in the extreme urgency of the times, do not amount to "giving aid and comfort to the rebellion."

But it is otherwise with investing in the stock of companies engaged in blockade running. *Bates' Case*, 4 Ct. of Cl. 569. And it is no defense to an indictment for attempting

With reference to the three last species of high treason must here be cited the statute 7 & 8 Will. 3, c. 3, which enacts (sect. 2) that no person shall be convicted of high treason or misprision of treason (*t*), "but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one and the other of them to another overt act of the same treason," unless the party indicted and arraigned shall confess the same; this statute, however, does not extend to "cases of high treason in compassing or imagining the death of the king, and of misprision of such treason, where the overt act or overt acts of such treason which shall be *alleged in the indictment for such offence shall be assassination or [* 93] killing of the king, or any direct attempt against his life, or any direct attempt against his person whereby his life may be endangered or his person may suffer bodily harm;" but the individual indicted for any such offence as just specified shall be tried "in every respect and upon the like evidence" as if he stood charged with murder (*u*).

Thus careful was the legislature, in the reign of Edw. III., to specify and reduce to a certainty the vague notions of treason, which had formerly prevailed in our courts. But the act does not stop here, it goes on thus:—"Because other like cases of treason may happen in time to come, which cannot be thought of nor declared at present, it is accorded, that if any other cause supposed to be treason, which is not above specified, doth happen before any judge; the judge shall tarry without going to judgment of the treason, till the cause be shewed and declared before the king and his parliament, whether it ought to be judged treason, or other felony." Sir Matthew Hale (*v*) is very high in his encomiums on the great wisdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this act, by not suffering them to run out (upon their own opinions) into constructive treasons, though in cases that seem to them to have a like parity of reason, but reserving them to the decision of parliament. This is a great security to the public, the judges, and even this sacred act itself; and leaves a weighty *memento* to judges to be careful and not over hasty in letting in treasons by construction or interpretation, especially in new cases that have not been resolved and settled. 2. He observes, that as the authoritative decision of these *casus omissi* is reserved to the king and parliament, the most regular way to do it is by * a new declarative act; and therefore the opinion of [* 94] any one or of both houses, though of very respectable weight, is not that solemn declaration referred to by this act, as the only criterion for judging of future treasons.

In consequence of this power, not indeed originally granted by the statute of Edw. III., but constitutionally inherent in every subsequent parliament (which cannot be abridged of any rights by the act of a precedent one), the legislature was extremely liberal in declaring new treasons in the unfortunate reign of king Richard II.; as, par-

New treasons declared since the statute.

(*t*) As to which *vide post*, p. 97.

(*u*) See 39 & 40 Geo. 3, c. 94, extended by 5 & 6 Vict. c. 51, s. 1. In treason, except where directed against the person of the sovereign,

the period of limitation is three years: 7 & 8 Will. 3, c. 3, ss. 5, 6.

(*v*) 1 Hale, P. C. 259.

forcibly to seize provisions outside of the enemy's line for the enemy's use, that the defendant promised to do so when a prisoner under compulsion. *United States v. Pryor*, 3 Wash. C. C. 287; 2 Whart. Crim. Law, § 2733.

ticularly, by the statute 21 Ric. 2, c. 3, which made the bare purpose and intent of killing or deposing the king, without any overt act to demonstrate it, high treason. And yet so little effect have over-violent laws to prevent any crime, that within two years afterwards this very prince was both deposed and murdered. And in the first year of his successor's reign, an act was passed (x), reciting, "that no man knew how he ought to behave himself, to do, speak, or say, for doubt of such pains of treason; and therefore it was accorded, that in no time to come any treason be judged otherwise than was ordained by the statute of king Edward III." This at once swept away the whole load of extravagant treasons introduced in the time of Richard II.

But afterwards, between the reign of Henry IV. and Queen Mary, and particularly in the bloody reign of Henry VIII., the spirit of inventing new and strange treasons was revived; among which we may reckon the offences of breaking prison or rescue, when the prisoner was committed for treason; uttering execrations against the king; calling him opprobrious names by public writing; counterfeiting the sign manual or signet; refusing to abjure the pope; marrying, without the royal licence, any of the king's children, sisters, aunts, nephews, or nieces; bare solicitation of the chastity of the queen or [* 95] * princess, or advances made by themselves; marrying with the king, by a woman not a virgin, without previously discovering to him such her unchaste life; judging or believing (manifested by any overt act) the king to have been lawfully married to Anne of Cleves; derogating from the king's royal style and title; and impugning his supremacy; and assembling riotously to the number of twelve, and not dispersing upon proclamation: all which new-fangled treasons were totally abrogated by the statute 1 Mar. c. 1, which once more reduced all treasons to the standard of the statute 25 Edw. 3. Since which time, though the legislature has been more cautious in creating new offences of this kind, yet the number has been somewhat increased, as we shall find upon a short review (y).

Other new species of high treason, over and above such treasons as were comprised under the statute of 25 Edw. 3, were created for the security of the protestant succession in the house of Hanover (z). By the statute 1 Ann. st. 2, c. 21, s. 3, if any one shall endeavour to deprive or hinder any person, being the next in succession to the crown according to the limitations of the act of settlement, from succeeding to the crown, and shall maliciously and directly attempt the same by any overt act, such offence shall be high treason. And by statute 6 Ann. c. 41, s. 1, if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm, that any other person hath any right or title to the crown of this realm, otherwise than according to the act of settlement; or that the kings of this realm with the authority of parliament are not able to make laws and statutes, to bind the crown and the descent thereof; such person shall be guilty of high treason. This offence (or [* 96] indeed maintaining this * doctrine in any wise, that the king and parliament cannot limit the crown) was once before made high treason by statute 13 Eliz. c. 1, during the life of that princess. And after her

(x) Stat. 1. Hen. 4, c. 10, which statute, as well as the 21 Ric. 2, c. 3, is repealed by 26 & 27 Vict. c. 125.

(y) The stat. 1 Mar. c. 1, was a confirmation so far of the stat. 1 Edw. 6, c. 12; por-

tions of these statutes are repealed by 26 & 27 Vict. c. 125.

(z) See stats. 13 & 14 Will. 3, c. 6, and 17 Geo. 2, c. 39, now repealed by 80 & 81 Vict. c. 59.

decease it continued a high misdemeanor, punishable with forfeiture of goods and chattels, even in the most flourishing era of indefeasible hereditary right and *jure divino* succession. But it was again raised into high treason, by the statute of Anne before mentioned, at the time of a projected invasion in favour of the then pretender; and upon this statute one Matthews, a printer, was convicted and executed in 1719, for printing a treasonable pamphlet, entitled "*Vox populi vox Dei*" (a).

Lastly, by statute 36 Geo. 3, c. 7, s. 1 (b), it was enacted that whosoever should within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim, or wounding, imprisonment or restraint, of the person of the then king, his heirs and successors, and such compassings, imaginations, inventions, devices, or intentions, or any of them, should express, utter, or declare, by publishing any printing or writing, or by any overt act or deed, being legally convicted thereof upon the oaths of two lawful and credible witnesses upon trial, or otherwise convicted or attainted by due course of law, should be deemed and adjudged to be a traitor, and should suffer pains of death, and also lose and forfeit as in cases of high treason (c).

Thus much for the crime of treason, or *læsæ majestatis*, in all its branches; which consisted originally in grossly counteracting that allegiance which is due from the subject by either birth or residence; though, in some *instances, the zeal of our legislators to stop the progress of some [*97] highly pernicious practices occasioned them a little to depart from this its primitive idea.

The judgment for high treason as prescribed by statute (d) is, that the person convicted shall be drawn on a hurdle to the place of execution, and be there hanged by the neck until he be dead; and that afterwards his head shall be severed from his body, and the body, divided into four quarters, shall be disposed of as her majesty shall think fit. The sovereign, however, by warrant under the sign manual, countersigned by a secretary of state, may direct that the offender shall not be drawn, but shall be taken, in such manner as in the warrant shall be expressed, to the place of execution, and that he shall not be there hanged by the neck, but that instead thereof the head shall be there severed from the body whilst alive; and such warrant may direct in what manner the body, head, and quarters shall be disposed of (e). The consequences of this judgment (attainder, forfeiture, and

(a) *R. v. Matthews*, 15 St. Tr. 1323.

(b) Made perpetual by 57 Geo. 3, c. 6, s. 1, but repealed, except as to the part cited *supra*, by 11 & 12 Vict. c. 12, s. 1.

(c) These unrepealed provisions of the 36 Geo. 3, c. 7, s. 1, are extended to Ireland by the 11 & 12 Vict. c. 12, s. 2.

Another statute creating a new treason, was the 3 & 4 Vict. c. 52, s. 4.

(d) 54 Geo. 3, c. 146, s. 1.

(e) By the stat. 30 Geo. 3, c. 48, women convicted of treason, shall receive judgment to be drawn to the place of execution, and there to be hanged by the neck till dead.

Formerly the judgment for high treason was—1. That the offender be drawn to the

gallows, and not be carried or walk; though usually (by connivance (38 Ass. pl. 7), at length ripened by humanity into law) a sledge or hurdle was allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out, and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the disposal of the crown. 8 Inst. 211. Women from the remotest times were sentenced to be burned alive for every species of treason: *Et si nale femme de aucuns treson soit atteinte, soit ars*. Britt. c. 8.

corruption of blood) must be referred to the latter end of this book, when we shall treat of them altogether, as well in treason as in other offences.

II. Misprision
of treason.

II. Misprision of treason is an offence against the crown, to which a brief reference only need here be made.

[*98] * Misprisions (a term derived from the old French, *mespris*, a neglect or contempt) are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon: and it is said, that a misprision is contained in every treason and felony whatsoever: and that, if the sovereign so please, the offender may be proceeded against for the misprision only (*f*). Upon this principle, indeed, while the jurisdiction of the Star Chamber subsisted, it was held that the king might remit a prosecution for treason, and cause the delinquent to be censured in that court, merely for a high misdemeanor: as happened in the case of Roger earl of Rutland, in 43 Eliz. who was concerned in the earl of Essex's rebellion (*g*). Misprisions are generally divided into two sorts: negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought not to be done.

Of the first, or negative kind, is misprision of treason; consisting in the bare knowledge and concealment of treason, without any degree of assent thereto: for any assent makes the party a principal traitor; as indeed the concealment, which was construed aiding and abetting, did at the common law: in like manner as the knowledge of a plot against the state, and not revealing it, was a capital crime at Florence, and in other states of Italy (*h*). But it was enacted by the statute 1 & 2 Ph. & M. c. 10, s. 8 (*i*), that a bare concealment of treason should be only held a misprision. This concealment becomes criminal, if the party apprised of the treason does not, as soon as conveniently may be, reveal it to some judge of assize or justice of the peace (*k*). But if there be any probable circumstances of assent, as if one goes to a * treason-
[*99] able meeting, knowing beforehand that a conspiracy is intended against the sovereign; or being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of it, but conceals it; this is an implied assent in law, and makes the concealer guilty of actual high treason (*l*). (647) The punishment of misprision of treason is loss of the profits of lands during life, forfeiture of goods, and imprisonment during life (*m*). Which total forfeiture of the goods was originally inflicted while the offence amounted to principal treason, and of

(*f*) Yearb. 2 Ric. 3, 10; Staundf. P. C. 37; Kel. 71; 1 Hale, P. C. 37; 1 Hawk. P. C. 55, 56. (*i*) This section is unrepealed by 26 & 27 Vict. c. 125.

(*k*) 1 Hale, P. C. 372.

(*g*) Hudson of the Court of Star Chamber; MS. in Mus. Brit.

(*l*) 1 Hawk. P. C. 56.

(*m*) 1 Hale, P. C. 374.

(*h*) Guicciard. Hist. b. 8 & 13.

(647) An act of congress makes it misprision of treason, punishable by imprisonment not exceeding seven years, and fine not exceeding one thousand dollars, if any person, having knowledge of the commission of any treason against the United States, "shall conceal, and not as soon as may be disclose and make known the same to the President of the United States, or some one of the judges thereof, or to the president or governor of a particular State, or some one of the judges or justices thereof." Act of April 30, 1790, chap. 9, § 2: 1 U. S. Stat. at Large, p. 112.

course included in it a felony, by the common law; and therefore is no exception to the general rule laid down in a former chapter (*n*), that wherever an offence is punished by such total forfeiture, it is felony at the common law.

III. The next offence against the sovereign to be noticed has been constituted by the 3rd section of the stat. 11 & 12 Vict. c. 12, which declares (*o*) any person guilty of felony who shall, "within the United Kingdom or without, compass, imagine, invent, devise, or intend, to deprive or depose our most gracious lady the queen, her heirs or successors, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of her majesty's dominions;" or to levy war against her majesty within any part of the United Kingdom, in order by force or constraint to compel her to change her counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe either house of parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom; "and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing, or writing, or by open and advised speaking, or *by any overt act or deed." And by sect. 7 of the same act an [*100] indictment for felony, framed under its provisions, will be valid, although the facts proved on the trial of the accused party shall amount in law to treason (*p*).

IV. To the offences hereinbefore mentioned must now be added those provided against by the stat. 5 & 6 Vict. c. 51, s. 2; which, in consequence of the repetition of certain attempts to injure and alarm her present Majesty, enacted, that if any person shall wilfully discharge, or point, aim, or present at or near to the person of the queen, any gun, pistol, or any other description of firearms or other arms, whether containing any explosive or destructive material or not; or shall discharge, or cause to be discharged, or attempt to discharge, any explosive substance or material near to the queen's person; or shall wilfully strike, or strike at, or attempt to strike, or strike at, the queen's person, or wilfully throw, or attempt to throw, anything at or upon her person; with intent in any of these cases to injure the person of the queen, or to alarm her, or to break the public peace, or whereby it shall be endangered; or if any person shall, near to the person of the queen, wilfully produce, or have any gun, pistol, or fire-arms, with intent to use the same to injure her person, or alarm her; the offender shall be guilty of a high misdemeanor (*q*).

Other misdemeanors and contempts against the sovereign may be constituted by refusing to assist her for the good of the public; either in her councils, by advice, if called upon; or in her wars, by personal service for defence of the realm, against a rebellion or invasion (*r*). Under which class may be ranked the neglecting to join * the *posse comitatûs*, or power of the county, being thereunto required by the sheriff or justices, accord- [*101]

(*n*) See p. 48.

(*o*) *Reg. v. O'Brien*, 1 Townsend St. Tr. 469.

(*p*) A period of limitation, in any such case as here provided for, is prescribed by the 4th sect. of the Act.

(*q*) The punishment for this offence pre-

scribed by the above stat. sect. 2, is penal servitude for seven or not less than five years, or imprisonment for not more than three years and whipping. See 20 & 21 Vict. c. 3, s. 2; 27 & 28 Vict. c. 47.

(*r*) 1 Hawk. P. C. 59.

ing to the statute 2 Hen. 5, c. 8 (s). Contempts against the sovereign may also be by preferring the interests of a foreign potentate to those of our own, or doing or receiving anything that may create an undue influence in favour of such extrinsic power: as, by taking a pension from any foreign prince without the consent of the crown (t). Or, by disobeying the lawful commands of the sovereign; whether by writs issuing out of his courts of justice, or by a summons to attend his privy council, or by letters from the sovereign to a subject commanding him to return from beyond seas, or by his writ of *ne exeat regno*, or proclamation, commanding the subject to stay at home (u). Disobedience to any of these commands is a high misprision and contempt; and so, lastly, is disobedience to any act of parliament, where no particular penalty is assigned: for then it is punishable, like the rest of these contempts, by fine and imprisonment (x).

Contempts and misprisings against the sovereign, may further be by speaking or writing against him, cursing or wishing him ill, giving out scandalous stories concerning him, or doing anything that may tend to lessen him in the esteem of his subjects, or may raise jealousies between him and his people (z).

V. Another species of offence against the sovereign, which, although long since obsolete, deserves our notice, is *præmunire*; so called from the words of the writ preparatory to the prosecution thereof: [* 102] "*præmunire (z) facias * A. B.*" cause A. B. to be forewarned that he appear before us to answer the contempt wherewith he stands charged: which contempt is particularly recited in the preamble to the writ (a). This form of criminal procedure took its origin from the exorbitant power claimed and exercised in England by the pope, which even in the days of blind zeal was too heavy for our ancestors to bear.

It may justly be observed, that religious principles, which (when genuine and pure) have an evident tendency to make their professors better citizens as well as better men, have (when perverted and erroneous) been usually subversive of civil government, and been made both the cloak and the instrument of every pernicious design that can be harboured in the heart of man. The unbounded authority that was exercised by the Druids in the west, under the influence of pagan superstition, and the terrible ravages committed by the Saracens in the east, to propagate the religion of Mahomet, both witness to the truth of that ancient universal observation, that in all ages and in all countries, civil and ecclesiastical tyranny have been mutually productive of each other. The church of England has, however, habitually inculcated due obedience to lawful authority, and has been (as her prelates on a trying occasion once expressed it (b)) in her principles and practice ever most unquestionably loyal. The clergy of her persuasion entertain in general just notions of the ties of society and the rights of civil government. As in matters of faith and morality they acknowledge no guide but the Scriptures, so, in matters of external polity and of private right, they derive all their title from the

(s) *Ante*, vol. i. chap. 9.

(t) 8 Inst. 144.

(u) See vol. i. chap. 7.

(x) 1 Hawk. P. C. 60.

(y) *Post*, chap. 8. To assert falsely that the sovereign labours under the affliction of mental derangement is criminal, and an

indictable offence. *R. v. Harvey*, 3 D. & R. 464.

(z) A barbarous word for *præmonere*. *Præmunio*, in law-latin, is used in its tenses and participles, for *præmonere* or *cito*. Ducange, Gloss. *ad verb.*

(a) Old. Nat. Brev. 101, edit. 1584.

(b) Address to James II. 1687.

civil magistrate; the great body of our clergy look up to the sovereign as their head, to the parliament as their lawgiver, and pride themselves in nothing more justly, than in being true members of the church, emphatically by law established. But notions of ecclesiastical liberty, when carried to an extreme, have ere now been destructive of *those ties and obligations by which [*103] society is kept together; encroaching on those rights, which reason and the original contract of every free state in the universe have vested in the sovereign power; and aiming at a distinct independent supremacy of their own, where spiritual men and spiritual causes are concerned. The effects of religious bigotry, when actuated by erroneous principles, even of the protestant kind, have been made evident by the history of the anabaptists in Germany, of the covenanters in Scotland, and of those sectaries in England, who, in the 17th century, overturned the church and monarchy, shook every pillar of law and private property, and aimed at establishing in their stead a kingdom of the saints. These devastations, though violent and tumultuous, were but of short duration. Whereas the progress of the papal policy, long actuated by steady counsels of the successive pontiffs, took deeper root, and was at length in some places with difficulty, in others has never yet, been extirpated. For this we might call to witness the intrigues of the Jesuits, once triumphant over Christendom, but now abandoned by even Roman catholic powers: our present subject, however, rather leads us to consider the vast strides which were formerly made in this kingdom by the popish clergy; how nearly they arrived to effecting their grand design; some few of the means they made use of for establishing their plan; and how almost all of them were defeated or converted to better purposes, by the vigour of our free constitution, and the wisdom of successive parliaments.

The ancient British church, by whomsoever planted, was a stranger to the bishop of Rome, and all his pretended authority. But the pagan Saxon invaders, having driven the professors of christianity to the remotest corners of our island, their own conversion was afterwards effected by Augustin the monk, and other missionaries from the court of Rome. This naturally introduced some few of the papal corruptions in points of faith and doctrine: but *we read of no civil [*104] authority claimed by the pope in these kingdoms, till the era of the Norman conquest; when the then reigning pontiff having favoured Duke William in his projected invasion, by blessing his host and consecrating his banners, took that opportunity also of establishing his spiritual encroachments; and was even permitted so to do by the policy of the conqueror, in order more effectually to humble the Saxon clergy and aggrandise his Norman prelates; prelates, who, being bred abroad in the doctrine and practice of slavery, had contracted a reverence and regard for it, and took a pleasure in riveting the chains of a free-born people.

The most stable system of rational government makes provision for a due subordination of rank, and a gradual scale of authority; and tyranny itself is most surely supported by a regular increase of despotism, rising from the slave to the sultan; with this difference, however, that the measure of obedience in the one is grounded on the principles of society, and is extended no farther than reason and necessity will warrant; in the other it is limited only by absolute will and pleasure, without permitting the inferior to examine the title upon which it is founded. More effectually therefore to enslave the con-

Origin and progress of the papal usurpation.

sciences and minds of the people, the Romish clergy themselves paid the most implicit obedience to their own superiors or prelates; and they, in their turns, were as blindly devoted to the will of the sovereign pontiff, whose decisions they held to be infallible, and whose authority they deemed to be co-extensive with the christian world. Hence his legates *a latere* were introduced into every kingdom of Europe, his bulls and decretal epistles became the rule both of faith and discipline, his judgment was the final resort in all cases of doubt or difficulty, his decrees were enforced by anathemas and spiritual censures, he dethroned even kings who were refractory, and denied to whole kingdoms (when undutiful) the exercise of christian ordinances, and the benefits of the gospel of God.

[*105] * But, though the being spiritual head of the church was a thing of great sound, and of greater authority, among men of conscience and piety, yet the court of Rome was fully apprised that (among the bulk of mankind) power cannot be maintained without property; and therefore its attention began very early to be riveted upon every method that promised pecuniary advantage. The doctrine of purgatory was introduced, and with it the purchase of masses to redeem the souls of the deceased. New-fangled offences were created, and indulgences were sold to the wealthy, for liberty to sin without danger. The canon law took cognisance of crimes, enjoined penance *pro salute animæ*, and commuted that penance for money. Non-residence and pluralities among the clergy, and marriages among the laity related within the seventh degree, were strictly prohibited by canon; but dispensations were seldom denied to those who could afford to buy them. In short, all the wealth of Christendom was sought to be drained and directed by a thousand channels, into the coffers of the holy see.

The establishment also of the feudal system in most of the governments of Europe, whereby the lands of all private proprietors were declared to be holden of the prince, gave a hint to the court of Rome for usurping a similar authority over all the preferments of the church; which began first in Italy, and gradually spread itself to England. The pope became a feudal lord; and all ordinary patrons were to hold their rights of patronage under this universal superior. Estates held by feudal tenure, being originally gratuitous donations, were at that time denominated *beneficia*; their very name as well as constitution was borrowed, and the care of the souls of a parish thence came to be denominated a benefice. Lay fees were conferred by investiture or delivery of corporal possession; and spiritual benefices, which at first were universally donative, now received in like manner a spiritual investiture, by institution [*106] from the bishop, and induction under *his authority. As lands escheated to the lord, in defect of a legal tenant, so benefices lapsed to the bishop upon non-presentation by the patron, in the nature of a spiritual escheat. The annual tenths collected from the clergy were equivalent to the feudal render, or rent reserved upon a grant; the oath of canonical obedience was copied from the oath of fealty required from the vassal by his superior; and the primer seisins of our military tenures, whereby the first profits of an heir's estate were cruelly extorted by his lord, gave birth to as cruel an exaction of first-fruits from the beneficed clergy. And the occasional aids and tallages, levied by the prince on his vassals, gave a handle to the pope to levy, by the means of his legates *a latere*, peter-pence and other taxations.

At length the holy father went a step beyond any example of either emperor or feudal lord. He reserved to himself, by his own apostolical authority (c), the presentation to all benefices which became vacant while the incumbent was attending the court of Rome upon any occasion, or on his journey thither, or back again; and moreover such also as became vacant by his promotion to a bishopric or abbey: "*etiamsi ad illa personæ consueverint et debuerint per electionem aut quemvis alium modum assumi.*" And this last, the canonists declared, was no detriment at all to the patron, being only like the change of a life in a feudal estate by the lord. Dispensations to avoid these vacancies begat the doctrine of commendams; and papal provisions were the previous nomination to such benefices, by a kind of anticipation, before they became actually void: though afterwards indiscriminately applied to any right of patronage exerted or usurped by the pope. In consequence of which the best livings were filled by Italian and other foreign clergy, equally unskilled in and averse to the laws and constitution of England. The very nomination to bishoprics, that ancient prerogative of the crown, was wrested from king * Henry I., and afterwards from his successor king John; and [* 107] seemingly indeed conferred on the chapters belonging to each see; but by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually vested in the pope. And to sum up this head with a transaction most unparalleled and astonishing in its kind, pope Innocent III. had at length the effrontery to demand, and king John had the meanness to consent to, a resignation of his crown to the pope, whereby England was to become for ever St. Peter's patrimony; and the dastardly monarch re-accepted his sceptre from the hands of the papal legate, to hold as the vassal of the holy see, at the annual rent of a thousand marks.

Another engine set on foot, or at least greatly improved, by the court of Rome, was a masterpiece of papal policy. Not content with the ample provision of tithes, which the law of the land had given to the parochial clergy, they endeavoured to grasp at the lands and inheritances of the kingdom, and (had not the legislature withstood them) might by this time have been masters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine and other rules, men of austere religion, separated from the world and its concerns by a vow of perpetual celibacy, yet fascinating the minds of the people by pretences to extraordinary sanctity, while all their aim was to aggrandise the power and extend the influence of their grand superior the pope. And as, in those times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they were taught to believe, that founding a monastery a little before their deaths would atone for a life of incontinence, disorder, and bloodshed. Hence innumerable abbeys and religious houses were built within a century after the conquest, and endowed, not only with the tithes of parishes which were ravished from the secular clergy, but also with lands, manors, lordships, and [* 108] * extensive baronies. And the doctrine inculcated was, that whatever was given to, or purchased by, the monks and friars, was consecrated to God himself: and that to alienate it or take it away was no less than the sin of sacrilege.

I might here have enlarged upon other contrivances, which will occur to the recollection of the reader, set on foot by the court of Rome, for effecting an entire exemption of its clergy from any intercourse with the civil magistrate: such as the separation of the ecclesiastical court from the temporal; the appointment of its judges by merely spiritual authority, without any interposition from the crown; the exclusive jurisdiction it claimed over all ecclesiastical persons and causes; and the *privilegium clericale*, or benefit of clergy, which delivered all clerks from any trial or punishment except before their own tribunal. But the history and progress of ecclesiastical courts (*d*), as well as of purchases in mortmain (*e*), have already been discussed: and we shall have an opportunity of adverting to the nature of the *privilegium clericale* in the progress of the present book. Therefore I need only observe at present, that notwithstanding this plan of pontifical power was so deeply laid, and so indefatigably pursued by the unwearied politics of the court of Rome through a long succession of ages; notwithstanding it was polished and improved by the united endeavours of a body of men, who engrossed all the learning of Europe for centuries together; notwithstanding it was firmly and resolutely executed by persons the best calculated for establishing tyranny and despotism, being fired with a bigoted enthusiasm (which prevailed not only among the weak and simple, but even among those of the best natural and acquired endowments), unconnected with their fellow-subjects, and totally indifferent what might befall that posterity to which they bore no endearing relation:—yet it [* 109] vanished into nothing, when the eyes of the *people were a little enlightened, and they set themselves with vigour to oppose it. So vain and ridiculous is the attempt to live in society, without acknowledging the obligations which it lays us under; to affect an entire independence of that civil state, which protects us in all our rights, and gives us every other liberty, that only excepted of despising the laws of the community.

Having thus in some degree endeavoured to trace out the origin and subsequent progress of the papal usurpations in England, let us now turn to the statutes of *præmunire*, which were framed to encounter this overgrown yet increasing evil. King Edward I., a wise and magnanimous prince, set himself in earnest to shake off this servile yoke. He would not suffer his bishops to attend a general council, till they had sworn not to receive the papal benediction. He made light of all papal bulls and processes: attacking Scotland in defiance of one: and seizing the temporalities of his clergy, who under pretence of another refused to pay a tax imposed by parliament. He strengthened the statutes of mortmain; thereby closing the great gulf, in which all the lands of the kingdom were in danger of being swallowed. And, one of his subjects having obtained a bull of excommunication against another, he ordered him to be executed as a traitor, according to the ancient law (*f*). Also, in the thirty-fifth year of his reign was made the first statute against papal provisions, being, according to sir Edward Coke (*g*), the foundation of all the subsequent statutes of *præmunire*, which was ranked as an offence immediately against the king, because every encroachment of the papal power is a diminution of the authority of the crown.

(*d*) See vol. III.

(*e*) See vol. II.

(*f*) Bro. Abr. tit. Coron. 115; Treason, 14; 3 Ass. 19.

(*g*) 2 Inst. 583.

In the weak reign of Edward II. the pope again endeavoured to encroach, but the parliament manfully withstood him; and it was one of the principal articles * charged against that unhappy prince, that he [* 110] Edward II. had given allowance to the bulls of the see of Rome. Edward III. But Edward III. was of a temper extremely different: and to remedy these inconveniences first by gentle means, he and his nobility wrote an expostulation to the pope; but receiving a menacing and contemptuous answer, withal acquainting him, that the emperor (who a few years before at the diet at Nuremberg, A.D. 1323, had established a law against provisors (h)) and also the king of France had lately submitted to the holy see; the king replied, that if both the emperor and the French king should take the pope's part, he was ready to give battle to them both, in defence of the liberties of the crown. Hereupon more sharp and penal laws were devised against provisors (i), which enacted that the court of Rome should not present or collate to any bishopric or living in England; and that whoever might disturb any patron in the presentation to a living by virtue of a papal provision, such provisor should pay fine and ransom to the king at his will, and be imprisoned till he renounced such provision: and the same punishment was inflicted on such as should cite the king, or any of his subjects, to answer in the court of Rome. And when the holy see resented these proceedings, and pope Urban V. attempted to revive the vassalage and annual rent to which king John had subjected his kingdom, it was unanimously agreed by all the estates of the realm in parliament assembled, 40 Edw. III., that king John's donation was null and void, being without the concurrence of parliament, and contrary to his coronation oath: and all the temporal nobility and commons engaged, that if the pope should endeavour by process or otherwise to maintain these usurpations, they would resist and withstand him with all their power (k).

In the reign of Richard II., it was found necessary to sharpen and strengthen these laws, and therefore it was enacted by statutes 3 Ric. [* 111] Richard II. 2, c. 3, and 7 Ric. 2, c. 12, first, that no alien should be capable of letting his benefice to farm; in order to compel such as had crept in, at least to reside on their preferments: and, afterwards, that no alien should be capable to be presented to any ecclesiastical preferment, under the penalty of the statutes of provisors. By the statute 12 Ric. 2, c. 15, all liegemen of the king, accepting of a living by any foreign provision, were put out of the king's protection, and the benefice was made void. To which the statute 13 Ric. 2, st. 2, cc. 2 and 3, added still further penalties.

In the writ for the execution of these statutes the words *præmunire facias*, being (as we said) used to command a citation of the party, have denominated in common speech not only the writ, but the offence itself of maintaining the papal power, by the name of *præmunire*. And accordingly the next statute I shall mention is usually called the statute of *præmunire*. It is the 16 Ric. 2, c. 5, which enacts, that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulls, instruments, or other things, which touch the king, against him, his crown, and realm, and all persons aiding and assisting therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to

(h) Mod. Univ. Hist. xxix. 298.

(i) Stats. 25 Edw. 3, st. 6; 27 Edw. 3, st. 1,

c. 1; 38 Edw. 3, st. 1, c. 4, and st. 2, cc. 1, 2,

3, 4.

(k) Seld. in Flet. 10, 4.

answer to the king and his council: or process of *præmunire facias* shall be made out against them as in other cases of provisors.

By the statute of 2 Hen. 4, c. 3, all persons who accept any provision from the pope, to be exempt from canonical obedience to their proper ordinary, are also subjected to the penalties of *præmunire*. And this is the last of our ancient statutes touching this offence; the usurped civil power of the bishop of Rome being pretty well broken down by these [* 112] statutes, as his usurped religious power * was in about a century afterwards; the spirit of the nation being so much raised against foreigners, that about this time, in the reign of Henry V., the alien priories, or abbeyes for foreign monks, were suppressed, and their lands given to the crown. And no further attempts were afterwards made in support of these foreign jurisdictions.

A learned writer, below referred to, is therefore greatly mistaken, when he says (l), that in Henry VI.'s time the archbishop of Canterbury (m) and other bishops offered to the king a large supply, if he would consent that all laws against provisors, and especially the statute 16 Ric. 2, might be repealed; but that this motion was rejected. This account is incorrect in all its branches. For, first, the application, which he probably means, was made, not by the bishops only, but by the unanimous consent of a provincial synod, assembled in 1439, 18 Hen. VI., that very synod which at the same time refused to confirm and allow a papal bull, which then was laid before them. Next, the purport of it was not to procure a repeal of the statutes against provisors, or that of Richard II. in particular; but to request that the penalties thereof, which by a forced construction were applied to all who sued in the spiritual, and even in many temporal, courts of this realm, might be turned against the proper objects only; those who appealed to Rome, or to any foreign jurisdiction: the tenor of the petition being, "that those penalties should be taken to extend only to those that commenced any suits or procured any writs or public instruments at Rome or elsewhere out of England; and that no one should be prosecuted upon that statute for any suit in the spiritual courts or lay jurisdictions of this kingdom." Lastly, the motion was so far from being rejected, that the king promised to recommend it to the next parliament, and in the meantime that no one should be molested upon this account. And the clergy [* 113] were so * satisfied with their success, that they granted to the king a whole tenth upon this occasion (n).

And indeed so far was the archbishop, who presided in this synod, from countenancing the usurped power of the pope in this realm, that he was ever a firm opposer of it. And, particularly in the reign of Henry V., he prevented the king's uncle from being then made a cardinal, and legate *a latere* from the pope; upon the mere principle of its being within the mischief of papal provisions, and derogatory from the liberties of the English church and nation. For, as he expressed himself to the king in his letter upon that subject, "he was bound to oppose it by his ligeance, and also to quit himself to God and the church of this land, of which God and the king had made him governor." This was not the language of a prelate addicted to the slavery of the see of Rome; but of one who was indeed of principles so very opposite to the papal usurpations, that in the year preceding this synod, 17 Hen. VI., he refused to

(l) *The Case of Præmunire*, Dav. 96.

(m) Archbishop Chichele.

(n) Wilk. Concl. Mag. Brit. iii. 583.

consecrate a bishop of Ely, who was nominated by Pope Eugenius IV. A conduct quite consonant to his former behaviour, in 6 Hen. VI., when he refused to obey the commands of Pope Martin V., who had required him to exert his endeavours to repeal the statute of *præmunire* ("exécrabile illud statutum," as the holy father phrases it); which refusal so exasperated the court of Rome against him, that at length the pope issued a bull to suspend him from his office and authority, which the archbishop disregarded, and appealed to a general council. And so sensible was the nation of the primate's merit, that the lords spiritual and temporal, and also the University of Oxford, wrote letters to the pope in his defence; and the house of commons addressed the king, to send an ambassador forthwith to his holiness, on behalf of the archbishop, who had incurred the displeasure of the * pope for opposing [* 114] the excessive power of the court of Rome (o)

This then is the original meaning of the offence, which we call *præmunire*; viz., introducing a foreign power into this land, and creating *imperium in imperio*, by paying that obedience to papal process, which constitutionally belonged to the crown alone, long before the reformation in the reign of Henry VIII.: at which time the penalties of *præmunire* were indeed extended to more papal abuses than before; as the kingdom then entirely renounced the authority of the see of Rome, though not all the corrupted doctrines of the Roman church. And therefore by the statutes 24 Hen. 8, c. 12, and 25 Hen. 8, cc. 19 & 21, to appeal to Rome from any of the king's courts, which (though illegal before) had at times been connived at; to sue to Rome for any licence or dispensation; or to obey any process from thence; was prohibited under the penalties of *præmunire*. And, in order to restore to the king in effect the nomination of vacant bishoprics, and yet keep up the established forms, it was enacted by statute 25 Hen. 8, c. 20, that if the dean and chapter refused to elect the person named by the king, or any archbishop or bishop to confirm or consecrate him, they should fall within the penalties of the statutes of *præmunire*.

Thus far the penalties of *præmunire* seem to have kept within the proper bounds of their original institution, the depressing the power of the pope: but, they being pains of no inconsiderable consequence, it has been thought fit to apply the same to other heinous offences; some of which bear more, and some less, relation to this original offence. For instance, to assert, maliciously and advisedly, by speaking or writing, that both or either of the houses of parliament have a legislative authority without the king, is declared a *præmunire* by statute 13 Car. 2, * c. 1, ss. 3, 7. By the *habeas corpus* act also, 31 Car. 2, c. 2, it is a *præmunire*, and incapable of the king's pardon, [* 115] besides other heavy penalties, to send any subject of the realm a prisoner into parts beyond the seas. So by the statute of 6 Anne, c. 7, to assert maliciously and directly, by preaching, teaching, or advised speaking, that the then pretended prince of Wales, or any person other than according to the acts of settlement and union, hath any right to the throne of these kingdoms; or that the king and parliament cannot make laws to limit the descent of the crown; such preaching, teaching, or advised speaking, is a *præmunire*: as writing, printing, or publishing the same doctrines amounted, we may remember, to high treason. By statute 6 Anne, c. 23, s. 9, if the assembly of peers of Scotland, con-

(o) See Wilk. Concil. Mag. Br. vol. iii. passim, and Dr. Duck's Life of Archbishop Chichele.

vened to elect their sixteen representatives in the British parliament, shall presume to treat of any other matter save only the election, they incur the penalties of a *præmunire*. And the statute 12 Geo. 3, c. 11, subjects to the penalties of the statute of *præmunire* all such as knowingly and wilfully solemnise, assist, or are present at, any forbidden marriage of such of the descendants of the body of king Geo. II. as are by that act prohibited to contract matrimony without the consent of the crown (*p*).

Having thus inquired into the nature and several species of *præmunire*, its punishment may be gathered from the foregoing and other statutes, which are thus shortly summed up by sir Edward Coke (*q*):—that from the conviction, the defendant shall be out of the king's protection, and his lands and tenements, goods and chattels, forfeited to the king: and that his body shall remain in prison at the king's pleasure: or (as other authorities have it) during life (*r*): which amount to the same thing; as the king by his prerogative may any time remit the whole, or any part, of the punishment, except in the case * of transgressing the statute of [**116*] *habeas corpus*. These forfeitures here inflicted, do not (by the way) bring this offence within our former definition of felony; being inflicted by particular statutes, and not by the common law. But so odious, sir Edward Coke adds, was this offence of *præmunire*, that a man attainted of the same might have been slain by any other man without danger of law: because it was provided by law (*s*), that any man might do to him as to the king's enemy: and any man may lawfully kill an enemy. However, the position itself, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful, by the law of nature and nations, to kill him in the heat of battle, or for necessary self-defence. And to obviate such savage and mistaken notions (*t*), the statute 5 Eliz. c. 1 (*u*), provided, that it should not be lawful to kill any person attainted in a *præmunire*, any law, statute, opinion, or exposition of law to the contrary notwithstanding. But still such delinquent, though protected as a part of the public from public wrongs, can bring no action for any private injury, how atrocious soever, being so far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance which he as an individual may suffer. And no man, knowing him to be guilty, can safely give him comfort, aid, or relief (*x*). But although the severe penalties of a *præmunire* have been denounced by many statutes, of which some are still unrepealed, prosecutions for this offence have been almost unheard of in our courts (*y*), and the offence itself may therefore be considered as obsolete, and as no longer forming a title in our criminal code.

[**117*] VI. Contempts against the sovereign's title, not *amounting to treason or *præmunire*, are the denial of his right to the crown in common and unadvised discourse: for, if it be by advisedly speaking, we have seen (*z*) that it amounts to a *præmunire*. This heedless species of contempt is punished by our law with fine and imprisonment:

(*p*) *Ante*, vol. i. p. 267. See the 3 & 4 Vict. c. 52, s. 4.

(*q*) 1 Inst. 129.

(*r*) 1 Bulst. 199.

(*s*) Stat. 25 Edw. 3, st. 5, c. 22.

(*t*) Bro. Abr. c. Corone, 196.

(*u*) Repealed by 7 & 8 Vict. c. 102.

(*x*) 1 Hawk. P. C. 55.

(*y*) See however *Lalor's Case*, 2 St. Tr. 533; *Crook's Case*, 6 id. 202.

(*z*) *Ante*, p. 115.

*CHAPTER VIII.

[*118]

OFFENCES AGAINST THE GOVERNMENT.

OF offences falling within the scope of this chapter:—

I. The first and principal is the mal-administration of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment: (648) wherein such penalties, short of death, are inflicted, as to the wisdom of the house of peers shall seem proper; consisting usually of imprisonment, fines, or perpetual disability.

I. Mal-administration of public officers.

II. Hither also may be referred the offence of embezzling the public money, called among the Romans *peculatus*, which the Julian law punished with death in a magistrate, and with deportation, or banishment, in a private person (a). (649) This is an offence punishable by indictment at common law, in virtue of two principles which have been thus enunciated (b). 1st. If a man accepts an office of trust and confidence concerning the public, especially when it is attended with profit, he is answerable to the crown for his execution of such office; and, 2ndly, Where there is a breach of trust, a fraud, or an imposition in a subject concerning the public, which, as between subject and subject, would only be actionable, yet as that concerns the crown and the public, it is indictable. Moreover, by stat. 50 Geo. 3, c. 59, s. 2, *if any officer, collector, or receiver, entrusted with the receipt, custody, or management of any part of the public revenues, shall knowingly furnish false statements or returns of the sums of money collected by him, or entrusted to his care, or of the balances of money in his hands, or under his control, the person so offending shall be adjudged guilty of a misdemeanor, punishable with fine and imprisonment, at the discretion of the court, and be rendered for ever incapable of holding any office under the crown. [*119]

(a) Inst. 4, 18, 9.

22 St. Tr. 155—6; Trial of Lord Melville, 29

(b) Per Lord Mansfield, *Bembridge's Case*, St. Tr. 549.

(648) The president, vice-president, and all civil officers of the United States may be impeached by the house of representatives for treason, bribery, and other high crimes and misdemeanors, and upon trial and conviction by the senate, removed from office. Const. U. S., art. 11, § 4; art. 1, § 2, sub. 5; id., § 3, sub. 6. See 1 Kent's Com. 289.

Cases of impeachment are expressly excepted out of the pardoning power by the constitution of the United States. Art. 11, § 2, sub. 1. And the constitutions of the several States contain similar exceptions.

For a thorough examination of the whole subject of impeachment and impeachable offenses, see *The Trial of Andrew Johnson*, 1868, 3 vols. See, also, 6 Am. Law Reg. (N. S.) 257 and 641.

(649) To sustain an indictment under an act of congress for embezzlement, the defendant must have violated some specific provision of the act. See *United States v. Foreythe*, 6 McLean, 584.

It is held that the embezzlement by an officer of a national bank of a special deposit in such bank, not being punishable by any statute of the United States, may be punished in a State court under a State law. *Com. v. Tenney*, 97 Mass. 50; *Com. v. Hall*, id. 570; *State v. Fuller*, 34 Conn. 280. See *Com. v. Felton*, 101 Mass. 204.

III. With respect to larceny, when committed by any person being employed in the public service of her Majesty, or by a constable or other person employed in the police of any county, city, borough, district, or place whatsoever, it is enacted (c) that if such person "shall steal any chattel, money, or valuable security belonging to or in the possession or power of her Majesty, or entrusted to or received, or taken into possession by him by virtue of his employment," he shall be guilty of felony (d). And whosoever, being employed, as aforesaid, and "entrusted by virtue of such employment with the receipt, custody, management, or control of any chattel, money, or valuable security, shall embezzle any chattel, money, or valuable security which shall be entrusted to or received or taken into possession by him by virtue of his employment, or any part thereof, or in any manner fraudulently apply or dispose of the same or any part thereof to his own use or benefit, or for any purpose whatsoever, except for the public service, shall be deemed to have feloniously stolen the same from her Majesty" (e).

[* 120] * IV. A peculiar species of misprision may here be noticed, namely, the concealing of treasure-trove, which belongs to the sovereign or his grantees by prerogative royal (f); the concealment of which was formerly punishable by death (g), but now only by fine and imprisonment (h).

V. The buying and selling of any public office has been adjudged to be *malum in se*, and indictable at common law (i), and the stat. 5 & 6 Edw. 6, c. 16, extended by stat. 49 Geo. 3, c. 126, was passed to put a stop to this evil practice—to prevent all corrupt bargains for the sale of patronage in matters of public concernment (k). By these enactments any (l) such bargain or sale is declared to be void, and the offender shall not only forfeit his right to such office, but shall be disabled to have or enjoy it afterwards. The offence thus constituted is a misdemeanor.

VI. Offences relative to the coinage were formerly regarded by our customary law as high contempts against the sovereign, and by the statute 25 Edw. 3, st. 5, c. 2, two species of such offences, viz., the actual counterfeiting the gold and silver coin of this kingdom; and the importing such counterfeit money with intent to utter it, knowing it to be false, were expressly declared to be high treason (m). The crime itself was

(c) 24 & 25 Vict. c. 96, s. 69.

(d) Punishment: penal servitude for any term not exceeding fourteen years and not less than five years; or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement. *Id.*; 27 & 28 Vict. c. 47, s. 1.

(e) 24 & 25 Vict. c. 96, s. 70. Punishment: penal servitude for any term not exceeding fourteen years and not less than five years; or to be imprisoned for any term not exceeding two years, with or without hard labour. See, also, 24 & 25 Vict. c. 96, ss. 71, 72.

(f) The concealment of treasure trove is included in this chapter as being an offence against the government by reason of the arrangement respecting the revenues of the crown mentioned *ante*, vol. i., chap. 8.

(g) Glan. l. 1, c. 2.

(h) 8 Inst. 133. See *Reg. v. Thomas, L. & C.* 313.

(i) *Stockwell v. North*, Noy, 102; *R. v. Vaughan*, 4 Burr. 2494; *R. v. Pollman*, 2 Camp. 229.

(k) *Per* Lord Denman, C. J., *Reg. v. Charretie*, 13 Q. B. 461.

(l) Certain offices are excepted from the operation of the above statutes. See 49 Geo. 3, c. 126, ss. 7, 9; *Sterry v. Clifton*, 9 C. B. 110.

(m) Sir M. Hale (1 P. C. 224), observes that before the statute of 25 Edw. 3, the offence of counterfeiting the coin was held to be only a species of petit treason; subsequent acts, however, following the example of that statute, made it equally high treason with an endeavour to subvert the government, though not quite equal in its punishment.

thus regarded, as * being a breach of allegiance, by infringing the royal prerogative, and assuming one of the attributes of the sovereign, [* 121] that, viz., of regulating the coinage: and besides, as all money which bears the stamp of the kingdom is sent into the world upon the public faith, as containing metal of a peculiar weight and standard, whoever falsifies this is an offender against the state, by contributing to render that public faith suspected. And for the same reasons, by a law of the Emperor Constantine (n), false coiners were declared guilty of high treason, and were condemned to be burnt alive: as by the laws of Athens (o) all counterfeiters, debasers, and diminishers of the current coin were subjected to capital punishment. However, it must be owned, that this method of reasoning was a little overstrained: counterfeiting or debasing the coin being usually practiced, rather for the sake of private and unlawful lucre, than out of any disaffection to the sovereign. And therefore both this and its kindred species of treason, that of counterfeiting the seals of the crown or other royal signatures, seem better denominated by the later civilians a branch of the *crimen falsi* or forgery (in which they are followed by Glanvil (p), Bracton (q), and Fleta (r)), than by Constantine and our Edward III., a species of the *crimen lasso majestatis* or high treason. For this confounds the distinction and proportion of offences: and, by affixing the same ideas of guilt upon the man who coins a groat and him who assassinates his sovereign, takes off from that horror which ought to attend the very mention of the crime of treason, and makes it more familiar to the subject.

* It would be useless further to enlarge upon the laws which formerly existed in reference to the coinage, inasmuch as they have [* 122] recently been consolidated and amended by the statute 24 & 25 Vict. c. 99, of which the more important sections enact as under:—

“Whosoever shall falsely make or counterfeit any coin (s) resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin” (t), shall be guilty of felony (u).

“Whosoever shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever, wash, case over, or colour any coin whatsoever resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means

(n) C. 9, 24. 2 Cod. Theod. *de falsis moneta*, l. 9.

(o) Pott. Ant. l. 1, c. 26.

(p) L. 14, c. 7.

(q) L. 8, c. 8, ss. 1 & 3.

(r) L. 1, c. 23.

(s) Where upon the trial of a person charged with an offence against the above act, it shall be necessary to prove that any coin produced in evidence against him is false or counterfeit, this may be proved by the evidence of any credible witness, not necessarily by an officer of the mint, s. 29; also by s. 30, every offence of falsely making or counterfeiting any coin, or of buying, selling, tendering, uttering, or putting off any false or counterfeit coin, against the provisions of the act, shall be deemed to be complete, although the coin so made, counterfeited, bought, sold,

tendered, uttered, or put off, shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected.

(t) The expression “the queen's current coin” includes “any coin coined in any of her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of her Majesty's dominions, and whether made of gold, silver, copper, bronze, or mixed metal.”

The expression “the queen's current gold or silver coin” includes “any gold or silver coin coined in any of her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise in any part of her Majesty's dominions, whether within the United Kingdom or otherwise.” S. 1.

(u) Sect. 2. As to the punishment for this offence, see n. (y), *infra*.

whatsoever, wash, case over, or colour any piece of silver or copper, or of coarse [* 123] gold or * coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin (x); or shall gild, or shall, with any wash or materials capable of producing the colour or appearance of gold, or by any means whatsoever, wash, case over, or colour any of the queen's current silver coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the queen's current gold coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or silver, or by any means whatsoever, wash, case over, or colour any of the queen's current copper coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the queen's current gold or silver coin," shall be guilty of felony (y).

"Whosoever shall impair, diminish, or lighten any of the queen's current gold or silver coin, with intent that the coin so impaired, diminished, or lightened may pass for the queen's current gold or silver coin," shall be guilty of felony (z).

[* 124] * "Whosoever shall unlawfully have in his custody or possession (a) any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by impairing, diminishing, or lightening any of the queen's current gold or silver coin, knowing the same to have been so produced or obtained," shall be guilty of felony (b).

"Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin at or for a lower rate or value the same imports or was apparently intended to import," shall be guilty of felony (c).

(x) The expression "false or counterfeit coin resembling or apparently intended to resemble, or pass for any of the queen's current gold or silver coin" includes "any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered, so as to resemble or be apparently intended to resemble or pass for any of the queen's current coin of a higher denomination."

(y) Sect. 8. Any person convicted of an offence against this or the preceding section of the act shall be liable to penal servitude for life, or for any term not less than five years; or to imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement. See 27 & 28 Vict. c. 47, s. 1.

(z) Sect. 4. Punishment: penal servitude for any term not exceeding fourteen, and not less than five years; or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(a) The expression "having any matter in the custody or possession of any person"

includes "not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit or for that of any other person." Sect. 1. The words "having in possession" are to be taken as implying a knowledge of that which is possessed. *Reg. v. Cohen*, 8 Cox, C. C. 41.

(b) Sect. 5. Punishment: penal servitude for any term not exceeding seven, and not less than five years; or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(c) Sect. 6. Punishment: penal servitude for life or for any term not less than five years; or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

"Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall import, or receive into the United Kingdom from beyond the seas any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit," shall be guilty of felony (*d*).

* "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall export, or put on board [* 125] any ship, vessel, or boat for the purpose of being exported from the United Kingdom, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current coin, knowing the same to be false or counterfeit," shall be guilty of a misdemeanor (*e*).

"Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit," shall be guilty of a misdemeanor (*f*).

"Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering, or putting off, have in his custody or possession, besides the false or counterfeit coin so tendered, uttered, or put off, any other piece of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the * queen's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days next ensuing, tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit," shall be guilty of a misdemeanor (*g*).

"Whosoever shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them," shall be guilty of a misdemeanor (*h*).

"Whosoever, having been convicted (*i*), of any such misdemeanor as in any of the last three paragraphs mentioned, or of any statutory felony relating to

(*d*) Sect. 7. Punishment: penal servitude for life, or for any term not less than five years; or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(*e*) Sect. 8. Punishment: imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(*f*) Sect. 9. Punishment: imprisonment for any term not exceeding one year, with or without hard labour, and with or without solitary confinement.

A like punishment is by s. 13 to be inflicted upon any one who shall, with intent to defraud, tender, utter, or put off as or for any of the queen's current gold or silver coin, any coin not being such current coin, or any piece of metal, resembling in size, figure,

and colour the current coin as or for which the same shall be so tendered, uttered, or put off, such coin or piece of metal so tendered, uttered, or put off being of less value than the current coin as or for which the same shall be so tendered, uttered, or put off. This offence is likewise constituted a misdemeanor. See *Reg. v. Robinson*, L. & C. 604.

(*g*) Sect. 10. Punishment: imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(*h*) Sect. 11. Punishment: penal servitude for the term of five years, or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(*i*) As to evidence of conviction for a previous offense, see s. 37.

the coin, shall afterwards commit any of the misdemeanors therein mentioned," shall be guilty of felony (*k*).

"Whosoever shall falsely*make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the queen's current copper coin (*l*); or whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or [* 127] proceed to make or mend, or buy or * sell, or have in his custody or possession, any instrument, tool or engine adapted and intended for the counterfeiting any of the queen's current copper coin; or shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current copper coin, at or for a lower rate of value than the same imports or was apparently intended to import," shall be guilty of felony (*m*).

"Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them," shall be guilty of a misdemeanor (*n*).

"Whosoever shall deface any of the queen's current gold, silver, or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened," shall be guilty of a misdemeanor (*o*); and no tender of payment in money made in any coin so defaced by stamping as aforesaid, shall be a legal tender (*p*).

"Whosoever shall make or counterfeit any kind of coin not being the queen's current gold or silver coin, but resembling or apparently intended to resemble [* 128] or * pass for any gold or silver coin of any foreign prince, state, or country" (*q*); and whosoever, without lawful authority or excuse (the proof of which shall lie on the party accused), shall bring or receive into the United Kingdom any such false or counterfeit coin, knowing the same to be false or counterfeit,—shall be guilty of felony (*r*).

Whosoever shall tender, utter, or put off any such false or counterfeit coin as last aforesaid, knowing the same to be false or counterfeit, shall be guilty of a misdemeanor (*s*).

(*k*) Sect. 12. Punishment: penal servitude for life, or for any term not less than five years; or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(*l*) The expression "the queen's copper coin" includes any copper coin and any coin of bronze or mixed metal coined in any of her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of her Majesty's dominions. S. 1.

(*m*) Sect. 14. Punishment: penal servitude for any term not exceeding seven and not less than five years; or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(*n*) Sect. 15. Punishment: imprisonment for any term not exceeding one year, with or without hard labour, and with or without solitary confinement.

(*o*) Sect. 16. Punishment: imprisonment for any term not exceeding one year, with or without hard labour.

(*p*) Sect. 17.

(*q*) Sect. 18.

(*r*) Sect. 19. Punishment for either of the above offences: penal servitude for any term not exceeding seven and not less than five years; or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(*s*) Sect. 20. Punishment: imprisonment for any term not exceeding six months, with

"Whosoever shall falsely make or counterfeit any kind of coin not being the queen's current coin, but resembling or apparently intended to resemble or pass for any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin of any foreign prince, state, or country," shall be guilty of a misdemeanor (*f*).

* Whosoever, without lawful authority or excuse (the proof where- [* 129] of shall lie on the party accused), shall knowingly make, mend, buy, sell, or have in his custody or possession any stamp, die, mould, or other implement for coining (*u*); and whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly convey out of any of her majesty's mints any stamp, die, mould, instrument, used in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals—shall be guilty of felony (*v*).

Lastly, if any coin be tendered as the queen's current gold or silver coin to any person who shall suspect the same to be diminished otherwise than by reasonable wearing, or to be counterfeit, such person may lawfully cut, break, bend, or deface the coin so tendered, and if any coin so cut, broken, bent, or defaced shall appear to be diminished otherwise than by reasonable wearing, or to be counterfeit, the person tendering the same shall bear the loss thereof; but if the same shall be of due weight, and shall appear to be lawful coin, the person cutting, breaking, bending, or defacing the same is required to receive the same at the rate it was coined for; and should any dispute arise whether the coin so cut, broken, bent, or defaced be diminished in manner aforesaid, or be counterfeit, it shall be heard and finally determined in a summary manner by a justice of the peace, and any piece of counterfeit or unlawfully diminished gold or silver coin which is tendered in payment of any part of her majesty's revenue may in like manner be cut, broken, or defaced (*x*).

As regards any felony punishable under the Coinage * Act, a [* 130] principal in the second degree, and an accessory before the fact, is punishable in like manner as a principal in the first degree; and an accessory after the fact to any such felony, is liable to be imprisoned for any term not exceeding two years, with or without hard labour (*y*). (650)

or without hard labour; and for a second similar offence, imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement (sect. 21); and for a third such offence, which is felony, penal servitude for life, or for any term not less than five years; or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement (s. 21).

(*z*) Sect. 22. Punishment for the first offence, imprisonment for any term not exceeding one year; and for the second offence penal servitude for any term not exceeding seven, and not less than five years; or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Also by s. 23, whosoever, without lawful

authority or excuse (the proof whereof shall lie on the party accused), shall have in his custody or possession any number of pieces exceeding five, or false or counterfeit foreign coin is liable to a penalty on summary conviction for such offence before a justice of the peace, and in default of payment to imprisonment.

(*u*) Sect. 24.

(*v*) Sect. 25. The punishment for either of the above offences is, penal servitude for life or for any term not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(*x*) Sect. 26.

(*y*) Sect. 35. As to fine and sureties for keeping the peace on conviction under the above act, see s. 38.

(650) Congress may provide for the punishment of counterfeiting the securities and current coin of the United States. Const. of U. S., art. 1, § 8.

Counterfeiting coin coined at the mint of the United States, or foreign coin by law made

The following offences, which fall properly within the limits of this chapter, must be dismissed with very brief notice:—

VII. The statute 37 Geo. 3, c. 70, s. 1 (made perpetual by the 57 Geo. 3, c. 7), enacts, that if a person shall maliciously and advisedly endeavour to seduce any one serving in her majesty's service by sea or land from his duty and allegiance, or to incite any person to commit any act of mutiny or mutinous practice, he shall be guilty of felony (z). Desertion is punishable under the annual Mutiny Acts.

VIII. By the 37 Geo. 3, c. 123, s. 1, it is enacted, that whoever shall administer, or cause to be administered, or shall be present at and consenting to the administering of, or shall take any oath or engagement intended to bind any person in any mutinous or seditious purpose, or to belong to any seditious society or confederacy, or to obey any committee, or any person, not having legal authority for that purpose, or not to give evidence against any confederate or other person, or not to discover any unlawful combination, or any illegal act, or any illegal oath or engagement, shall be guilty of felony (a). Also the 52 Geo. 3, c. 104, s. 1, subjects to severe punishment as well the person who administers as the person who takes an oath to commit treason, murder, or other capital felony (b).

IX. The serving a foreign state, which service is generally inconsistent with allegiance to one's natural prince, is restrained by the Foreign Enlistment Act (59 Geo. 3, c. 69), of which s. 1 enacts, that any natural born subject of her majesty who, without licence from the crown,

(z) Punishment: penal servitude for life or for not less than five years,—or imprisonment for not more than three years.

(a) Punishment: penal servitude for any term not exceeding seven nor less than five years. Compulsion will be no excuse for disobedience to the statute, unless the party, within four days after he has an opportunity, disclose the whole of the case to a justice of the peace, or, if a seaman or soldier, to his commanding officer (s. 2).

(b) The above statute subjects the party administering an oath binding the person who takes it to commit treason, murder, or

any capital felony, to the punishment of death, which was reduced by the 1 Vict. c. 91, s. 1, to transportation for life or not less than fifteen years,—or imprisonment not exceeding three years. The punishment now to be awarded is penal servitude for life, or not less than five years,—or imprisonment for not more than three years.

See the statutes 39 Geo. 3, c. 70, 57 Geo. 3, c. 19, and 2 & 3 Vict. c. 12, as to the prevention of seditious meetings and assemblies; and the 60 Geo. 3, c. 1, for preventing the training of persons to the use of arms, and to the practice of military evolutions and exercise.

current in the United States, or knowingly importing or passing false coin as true, with intent to defraud, is by statute declared felony, and the punishment thereof prescribed. See Act of April 21, 1806, §§ 1, 2; 2 Stat. at Large, p. 404; Act of March 3, 1825, §§ 20, 21; 4 Stat. at Large, p. 121; Act of June 8, 1864, chap. 114; 13 Stat. at Large, p. 120. See as to the punishment for forgery or counterfeiting treasury notes, Act of December 17, 1860, chap. 1, § 12; 12 Stat. at Large, p. 123; Act of February 25, 1862, chap. 33, § 6; 12 Stat. at Large, p. 347.

Congress has given the State courts concurrent jurisdiction in all cases of counterfeiting of the United States coin. See Acts of Congress April 21, 1806, chap. 49; March 3, 1823, chap. 166; March 3, 1825, chap. 296. And the legislatures of several States have passed acts making the offense highly penal. See *State v. McPherson*, 9 Iowa, 53; *Sisemore v. State*, 3 Head (Tenn.), 26; *State v. Tutt*, 2 Bailey (S. C.), 44; *Chess v. State*, 1 Blackf. (Ind.) 198; *Com. v. Fuller*, 8 Metc. (Mass.) 318; *Moore v. People*, 14 How. (U. S.) 13; *Fox v. Ohio*, 5 id. 410; *Prigg v. Com.*, 16 Pet. 630; *Sutton v. State*, 9 Ohio, 133; *Manley v. People*, 7 N. Y. (3 Seld.) 295; *People v. Stanton*, 39 Cal. 698; 3 Whart. Crim. Law, § 1500. But see *State v. Shoemaker*, 7 Mo. 177; *Matthesin v. State*, 3 id. 421; *Rump v. Com.*, 30 Penn. St. 475.

shall take or accept, or agree to take or accept, any military commission, or shall enter into the military or naval service of any foreign prince, state, or potentate, or shall without such leave and licence go to any foreign country, or to any place beyond seas, with intent to enlist or serve in any warlike operation whatever, whether by land or by sea, shall be guilty of a misdemeanor. And if any person whatever, in any part of her majesty's dominions, shall procure or attempt to procure any person to enlist or be employed in the land or sea service of any foreign prince, state, or potentate, he likewise shall be guilty of a misdemeanor, punishable by fine and imprisonment, or either of them, at the discretion of the court. Further, the 7th section of this statute renders guilty of a misdemeanor any one who shall, without leave and licence from the crown first obtained, equip, furnish, fit out, or arm any ship with intent or in order that it shall be employed in the service of any foreign prince as a transport or with * intent to cruise or commit hostilities against any state [* 132] at peace with this country (c).

X. For the more effectual protection of her majesty's naval stores, the statute now operative is the 30 & 31 Vict. c. 119 (d), which empowers the admiralty to apply to such stores specific marks, described in the
*X. Embezzling
 naval stores, &c.* schedule to the act, and enacts as under:—

If any person, without lawful authority (proof of which authority shall lie on the party accused), applies any of the said marks in or on any such stores, he shall be guilty of a misdemeanor (e).

If any person, with intent to conceal her majesty's property in any naval stores, takes out, destroys, or obliterates, wholly or in part, any such mark as aforesaid, he shall be guilty of felony (f).

If any person, without lawful authority (proof of which authority shall lie on the party accused), receives, possesses (g), keeps, sells, or delivers any naval stores bearing any such mark (h) as aforesaid; knowing them to * bear [* 133] such mark, he shall be guilty of a misdemeanor (i). Similar pro-

(c) See *Att.-Gen. v. Sillem*, 2 H. & C. 431. Punishment: fine or imprisonment, or both; and a penalty of 50*l.* is imposed on masters of ships and owners for assisting in the offence.

(d) Repealing the 27 & 28 Vict. c. 91, by which many prior enactments in regard to her majesty's naval and victualling stores were repealed, except as to Scotland and Ireland.

(e) Sect. 5. Punishment: imprisonment for any term not exceeding two years, with or without hard labour.

(f) Sect. 6. Punishment; penal servitude for not more than five years, or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(g) For the purposes of the act, "stores shall be deemed to be in the possession or keeping of any person if he knowingly has them in the actual possession or keeping of any other person, or in any house, building, lodging, apartment, field, or place, open or inclosed, whether occupied by himself or not, and whether the same are so had for his own use or benefit or for the use or benefit of another." S. 18.

(h) In order to prevent a failure of justice in some cases by reason of the difficulty of proving knowledge of the fact that stores bore such a mark as aforesaid, s. 12 enacts that, if any naval or victualling stores bearing any such mark are found in the possession of any person not being a dealer in marine stores or a dealer in old metals, and not being in her majesty's service, and such person when taken or summoned before a justice of the peace, does not satisfy the justice that he came by the stores so found lawfully, he shall be liable, on conviction by the justice, to a penalty not exceeding 5*l.*; and if any such person satisfies the justice that he came by the stores so found lawfully, the justice, at his discretion, as the evidence given and the circumstances of the case require, may summon before him every person through whose hands such stores appear to have passed, and if any such person as last aforesaid who has had possession thereof does not satisfy the justice that he came by the same lawfully, he shall be liable, on conviction by the justice, to a like penalty.

(i) Sect. 7. Punishment: imprisonment for any term not exceeding one year, with or without hard labour.

tection has been extended to War Department stores by the 30 & 31 Vict. c. 128.

XI. To the offences already enumerated in this chapter may be added that of unlawfully and maliciously setting fire to any building (other than such as are mentioned in ss. 1—4 of the act concerning malicious injuries to property, 24 & 25 Vict. c. 97), belonging to the queen, or devoted or dedicated to public use or ornament, which is constituted felony (*k*); and, lastly,

[* 134] * XII. The offence constituted by statute 12 Geo. 3, c. 24 (*l*), of setting on fire, burning or destroying any of her majesty's ships of war, whether built, building, or repairing; or any of the royal arsenals, magazines, dock-yards, rope-yards, or victualling offices, or materials thereunto belonging; or military, naval, or victualling stores, or ammunition; or causing, aiding, procuring, abetting, or assisting in, such offence; which is felony still punishable with death (*m*). (651)

XI. Setting fire to ships of war, &c.
Where the person charged with such a misdemeanor as above-mentioned was at the time at which the offence is charged to have been committed in her majesty's service, or a dealer in marine stores, knowledge on his part that the stores to which the charge relates bore such mark as aforesaid shall be presumed until the contrary is shown (s. 8). And any person charged with such a misdemeanor in relation to stores the value of which does not exceed 5*l*. shall be liable on summary conviction before a justice of the peace to a penalty not exceeding 20*l*., or, in the discretion of the justice, to imprisonment for any term not exceeding six months, with or without hard labour (s. 9).

With the above statute 30 & 31 Vict. c. 119, certain sections of the Larceny Act (24 & 25 Vict. c. 96) have been incorporated (see s. 15).

(*k*) 24 & 25 Vict. c. 97, s. 5. Punishment: penal servitude for life or for not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping. As to the demolition of public buildings by rioters, see s. 11.

(*l*) S. 1. See also stat 24 & 25 Vict. c. 115, art. 30.

(*m*) Stat. 7 & 8 Geo. 4, c. 28, s. 7.

(651) It may be stated generally as to the offenses of the nature of those enumerated in the foregoing chapter, that they are brought within the jurisdiction of the federal courts by act of congress, and embrace two classes of cases. First, such cases as arise under the Act of March 3, 1825, chap. 65; and see Act of April 5, 1866, chap. 24. Second, cases which, by particular statutes, are expressly made the subjects of federal jurisdiction. As to the latter, see Acts of April 30, 1790; April 30, 1818; March 3, 1825; March 3, 1828; May 8, 1793; March 2, 1819; August 18, 1856. In several of the acts referred to, however, it is provided that nothing therein shall be construed to deprive the courts of the individual States of jurisdiction under the laws of the several States over offenses made cognizable by these acts. See, as to the statutory jurisdiction of the federal courts, 1 Whart. Crim. Law, 174—180.

*CHAPTER IX.

[* 135]

OFFENCES AGAINST PUBLIC JUSTICE.

THE order of our distribution will next lead us to take into consideration such criminal acts as more especially affect the commonwealth, or public polity of the kingdom: these, however, as well as offences which are peculiarly pointed against the lives and security of private subjects, are also offences against the sovereign as the *paterfamilias* of the nation: to whom it appertains by his regal office to protect the community, and each individual thereof, from every degree of injurious violence, by executing those laws, which the people themselves in conjunction with him have enacted; or at least have consented to, by an agreement either expressly made in the persons of their representatives, or by a tacit and implied consent presumed and proved by immemorial usage.

The class of crimes which we have now before us, is subdivided into such a number of inferior and subordinate species, that it would much exceed the bounds of an elementary treatise, and be insupportably tedious to the reader, were I to examine them all minutely, or with any degree of critical accuracy. I shall therefore confine myself principally to general definitions, or descriptions of these various offences, and to the punishment inflicted by law for each of them; with now and then a few incidental observations: referring the student for more particulars to other voluminous authors; who have treated of these subjects with greater precision and more in detail, than is consistent with the plan of these Commentaries.

* Crimes more especially affecting the commonwealth, may be dis- [* 136]
cussed under four heads:—as offences against public justice, against the public peace, against public trade, against the public health and safety, morals and economy: of each of which we will take a cursory view in the order indicated.

First, offences against public justice. First, then, of offences against public justice: some of which are felonious; others only misdemeanors. I shall begin with those that are most penal, and descend gradually to such as are of less malignity.

Forgery (*a*) is a very heinous offence, sometimes directed against public justice, of which several species should here be noticed.

I. As to forging her majesty's seals, it is enacted that, "Whosoever shall forge or counterfeit, or shall utter, knowing the same to be forged or counterfeited," the great seal of the United Kingdom, her majesty's privy seal, any privy signet of her majesty, or her majesty's royal sign manual, or "shall forge or counterfeit the stamp or impression of any of the seals aforesaid, or shall utter any document or instrument whatsoever, having thereon or affixed thereto the stamp or impression of any such forged or counterfeited seal, knowing the same to be the stamp or impres-

(a) "To forge is metaphorically taken and forgeth what fashion or shape he will." from the smith, who beateth upon his anvil 8 Inst. 169.

sion of such forged or counterfeited seal, or any forged or counterfeited stamp or impression made or apparently intended to resemble the stamp or impression of any of the seals aforesaid, knowing the same to be forged or counterfeited, or shall forge or alter or utter knowing the same to be forged or altered, any document or instrument having any of the said stamps or impressions thereon or affixed thereto," shall be guilty of felony (b).

[*137] *II. Embezzling or vacating records, or falsifying certain other proceedings in a court of judicature, is likewise a felonious offence against public justice; as to which it is enacted by statute 24 & 25

II. Injuries to records, and falsifying proceedings of courts, &c.

Vict. c. 96, s. 30, that whosoever shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously cancel, obliterate, injure, or destroy any record, writ, rule, order, or original document of any court of record, or relating to any matter, civil or criminal, in any such court, or any bill, petition, answer, order, decree, or original document of or belonging to any court of equity, or relating to any cause or matter therein, or any original document in anywise relating to the business of any office under her majesty, and being in any office appertaining to a court of justice, or in any of her majesty's palaces, or in any government or public office, shall be guilty of felony (c).

As to records, process, and instruments of evidence, it is also enacted by statute 24 & 25 Vict. c. 98, s. 27:—that "whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered," any record, writ, process, rule, order, or original document of any court of record, or any bill, petition, process, rule, answer, decree, or original document of or belonging to any court of equity or court of admiralty, or any document or writing, or any copy thereof, used or intended to be used as evidence in any such court as aforesaid, shall be guilty of felony (d).

[*138] *Also by s. 28 of the same statute:—Whosoever, being the clerk of any court, or officer having the custody of the records of any court, or his deputy, "shall utter any false copy or certificate of any record, knowing the same to be false; and whosoever, other than such clerk, officer, or deputy, shall sign or certify any copy or certificate of any record, as such clerk, officer, or deputy; and whosoever shall forge or fraudulently alter, or offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any copy or certificate of any record, or shall offer, utter, dispose of, or put off any copy or certificate of any record having thereon any false or forged name, handwriting, or signature, knowing the same to be false or forged; and whosoever shall forge the seal of any court of record, or shall forge or fraudulently alter any

(b) 24 & 25 Vict. c. 98, s. 1. Punishment: Penal servitude for life or for not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

As to fine and sureties for keeping the peace on conviction for a misdemeanor or felony under the above act, see s. 51.

(c) Punishment: penal servitude for five

years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(d) Punishment: penal servitude for any term not exceeding seven years and not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

process of any court other than such courts" as in the last preceding paragraph (e) mentioned, "or shall serve or enforce any forged process of any court whatsoever, knowing the same to be forged, or shall deliver or cause to be delivered to any person any paper falsely purporting to be any such process, or a copy thereof, or to be any judgment, decree, or order of any court of law or equity, or a copy thereof, knowing the same to be false, or shall act or profess to act under any such false process, knowing the same to be false, shall be guilty of felony (f).

By certain other sections of the same act of 24 & 25 Vict., the undermentioned persons are likewise to be adjudged guilty of felony:—

1. Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be *forged or fraudulently [*139] altered, any instrument, whether written or printed, which is or shall be made evidence by any statute, and for which offence no other punishment is by the principal enactment provided (g).

2. Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any court roll or copy of any court roll, relating to any copyhold or customary estate, with intent to defraud (h).

3. Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any memorial, affidavit, affirmation, certificate, or writing, made or issued under the provisions of any statute, relating to the registry of deeds, or shall forge or counterfeit the seal of or belonging to any office for the registry of deeds, or any stamp or impression of any such seal; or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of any person to any such memorial, affidavit, affirmation, certificate, or writing which shall be required or directed to be signed by any statute, or shall offer, utter, dispose of, or put off any such memorial or other writing as in this paragraph before mentioned, having thereon any such forged stamp or impression of any such seal, or any such forged name, handwriting, or signature, knowing the same to be forged (i).

4. "Whosoever, with intent to defraud, shall forge or *alter, or shall offer, utter, dispose of, or put off, knowing the same to be [*140] forged or altered, any summons, conviction, order, or warrant of any justice of the peace, or any recognizance purporting to have been entered into before any justice of the peace, or other officer authorized to take the same, or any examination, deposition, affidavit, affirmation, or solemn declaration, taken or made before any justice of the peace" (j).

(e) *Ante*, p. 137.

(f) Punishment: same as *supra*. As to forging the seal of a county court or serving any forged process of such court knowing the same to be forged, see 9 & 10 Vict. c. 95, s. 57. See a similar enactment in the Bankruptcy Act, 12 & 13 Vict. c. 106, s. 273; *et vide* Russell, Cr. 4th ed. ii. 856-7.

(g) Sect. 29. Punishment: penal servitude for any term not exceeding seven years and not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(h) Sect. 30. Punishment: penal servitude for life or for any term not less than five

years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(i) Sect. 31. Punishment: penal servitude for any term not exceeding fourteen years and not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(j) Sect. 32. Punishment: penal servitude for five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

5. Whosoever, with intent to defraud, shall forge or alter any certificate, declaration of trust, or writing made or purporting or appearing to be made by the accountant-general, or any other officer of the court of chancery, or by any officer of any court, or the name, handwriting, or signature of any such accountant-general, or officer as aforesaid, or shall offer, utter, dispose of, or put off any such certificate, declaration of trust, or writing, knowing the same to be forged or altered (*k*).

6. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall, in the name of any other person, acknowledge any recognizance or bail, or any cognovit actionem, or judgment, or any deed or other instrument, before any court, judge, or other person lawfully authorized in that behalf (*l*).

III. A third offence against public justice is obstructing the execution of lawful process. This is at all times an offence of a very high and presumptuous nature; but more particularly so, when it is an obstruction of an
III. Obstructing process. [* 141] *arrest upon criminal process. (652) And it has been held, that the party opposing such arrest becomes thereby *particeps criminis*; that is, an accessory in felony, and a principal in high treason (*m*). Formerly, one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent persons assembled together to shelter themselves from justice (especially in London and Southwark), under the pretext of their having been ancient palaces of the crown, or the like: all of which sanctuaries for iniquity were demolished, and the opposing of any process therein made highly penal, by the statutes 8 & 9 Will. 3, c. 27, 9 Geo. 1, c. 28, and 11 Geo. 1, c. 22.

In regard to certain offences falling within the class before us, it is now enacted as follows:—

Whosoever shall unlawfully and maliciously, by any means whatsoever, wound, or cause any grievous bodily harm to any person, or shoot at any person, or by drawing a trigger, or in any other manner, attempt to discharge any

(*k*) Sect. 33. Punishment: penal servitude for any term not exceeding fourteen years and not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

for any term not exceeding seven years and not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(*m*) 2 Hawk. P. C. 131.

(*l*) Sect. 34. Punishment: penal servitude

(652) See *State v. Downer*, 8 Vt. 424; *State v. Buchanan*, 17 id. 573; *State v. Haily*, 2 Strobb. (S. C.) 73; *Com. v. Miller*, 2 Ashm. 61. To constitute the offence of resisting an officer, it must be shown that the process is legal. *People v. Muldoon*, 2 Park. 13. But in making an arrest an officer is not bound to exhibit his warrant and read it to the prisoner before securing him, if he resists. *Com. v. Cooley*, 8 Gray (Mass.), 354.

It is a sufficient defense to an indictment for resistance if it appears that the defendant was ignorant that the party resisted was an officer. *Johnson v. State*, 26 Texas, 117; *People v. Muldoon*, 2 Park. 13. See *Com. v. Kirby*, 2 Cush. (Mass.) 577; *Com. v. Cooley*, 6 Gray (Mass.), 350. But this will not excuse a violent assault. See 2 Whart. Crim. Law, § 1291.

As to whether third persons are indictable for resisting or assaulting a mere officer *de facto*, see *State v. Boies*, 34 Me. 235; *Muir v. State*, 8 Blackf. (Ind.) 154; *People v. Cook*, 8 N. Y. (4 Seld.) 67; *People v. Hopson*, 1 Denio, 574; *Bell v. Tooley*, 11 Ired. (N. C.) 605; *United States v. Wood*, 2 Gallis. 381; *Morse v. Colby*, 5 N. H. 222; *McKim v. Somers*, 1 Penn. 297; *In re Boyle*, 9 Wis. 264.

kind of loaded arms, at any person, with intent to resist or prevent the lawful apprehension or detainer of any person shall be guilty of felony (*n*).

Also, whosoever "shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence," shall be guilty of a misdemeanor (*o*).

* Besides the foregoing statutory offences, the wilful refusal to aid a peace-officer in the execution of his duty, in order to preserve the peace, is an indictable misdemeanor at common law (*p*). [* 142] (653)

IV. An escape of a person arrested upon criminal process, is also an offence against public justice, for which the party escaping is punishable by fine or imprisonment (*q*). But the officer permitting such escape, either

IV. *Escape.* by negligence or connivance, is more culpable than the prisoner: the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody, till cleared by the due course of justice. Officers therefore who, after arrest, negligently permit a felon to escape, are punishable by fine (*r*): but a voluntary escape, by consent and connivance of the officer, is a more serious offence: and for it, before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned (*s*).

Moreover, it is generally agreed that such an escape amounts to the same kind of offence, and is punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass. And this whether he were actually * committed to gaol, [* 143] or only under a bare arrest (*t*). But the officer cannot be thus punished, till the original delinquent has actually received judgment or been attainted upon verdict, confession, or outlawry, of the crime for which he was so committed or arrested: otherwise it might happen, that the officer

(*n*) 24 & 25 Vict. c. 100, s. 18. Punishment: penal servitude for life, or for not less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

As to fine and sureties for keeping the peace on conviction for a misdemeanor or felony under the above act, see s. 71.

(*o*) 24 & 25 Vict. c. 100, s. 38. Punishment: imprisonment for not more than two years, with or without hard labour. See, also s. 27.

(*p*) *Reg. v. Brown*, 1 C. & Mar. 314.

(*q*) 2 Hawk. P. C. 122. See 14 & 15 Vict. c. 100, s. 29.

(*r*) 1 Hale, P. C. 600.

(*s*) 1 Hale, P. C. 588, 9; 2 Hawk. P. C. 134, 5. There must be an actual arrest, as well as a lawful arrest, to make an escape criminal in an officer. 2 Hawk. c. 19, ss. 1, 2. It

must also be for a criminal matter. *Id.* s. 8. And the imprisonment must be continuing at the time of the offence. *Id.* s. 4; 1 Hale, P. C. 594.

Private individuals, who have persons lawfully in their custody, are guilty of an escape if they suffer them illegally to depart, 1 Hale, P. C. 595; but they may protect themselves from liability by delivering over their prisoner to some legal and proper officer. 1 Hale, P. C. 594, 595. Of a private person, thus guilty of an escape, the punishment is fine, or imprisonment, or both. 2 Hawk. c. 20, s. 6.

By the 52 Geo. 3, c. 156, persons aiding the escape of prisoners of war are guilty of felony. Punishment: penal servitude for life, or for not less than five years.

(*t*) 1 Hale, P. C. 590; 2 Hawk. P. C. 134.

(653) See *The State v. Hailey*, 2 Strobb. (S. C.) 73; *Comfort v. Com.*, 5 Whart. (Penn.) 487; *Coyle v. Hurtin*, 10 Johns. 85; *State v. Deniston*, 6 Blackf. (Ind.) 277.

might be punished for treason or felony, and the person arrested and escaping might turn out to be an innocent man (*u*). (654)

V. Breach of prison by the offender himself, when committed for any cause, was felony at common law (*x*): or even conspiring to break it (*y*). But this severity was mitigated by the statute *de frangentibus prisonam*, 1 Edw. 2, st. 2, c. 1, which enacted that no person should have judgment of life or member for breaking prison, unless committed for some capital offence. To break prison and escape, when lawfully committed for any treason or felony, remains however still felony as at common law (*z*); and to break prison when lawfully confined upon any other inferior charge, is punishable as a misdemeanor. (655)

(*u*) See the stat. 6 & 7 Vict. c. 26, ss. 22, 23, as to escapes from Milbank prison; 5 & 6 Vict. c. 29, s. 25, as to escapes from Pentonville prison; 1 & 2 Vict. c. 82, ss. 12, 13, as to Parkhurst prison; and 11 & 12 Vict. c. 42, ss. 12—15, as to escaping into the Isle of Man, Ireland, or the Channel Islands.

(*x*) 1 Hale, P. C. 607.

(*y*) Bract. 1. 3, c. 9.

(*z*) Punishment: penal servitude for not more than seven nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and solitary confinement and whipping. 7 & 8 Geo. 4, c. 28, s. 8.

(654) Any person who refuses to undergo that punishment which the law imposes upon him, and frees himself therefrom by an escape from lawful custody, though he does not use force or violence, is guilty of a violation of law, and makes himself amenable to punishment for an offense against public justice. *Com. v. Farrell*, 5 Allen (Mass.), 130.

Neither the negligence nor even the consent of the keeper will justify a prisoner in departing from prison. If he departs, though the doors of his cell are wide open, he commits an offense at common law. *State v. Doud*, 7 Conn. 884; *Riley v. The State*, 16 id. 47. And the keeper who, voluntarily or negligently, permits a prisoner to go at large, thereby commits the crime of escape (ib.; *Luckey v. State*, 14 Texas, 400; *Weaver v. Com.*, 29 Penn. St. 445; *Colby v. Sampson*, 5 Mass. 310. See *Brock v. King*, 2 Jones [N. C.], 302; *Nall v. The State*, 34 Ala. 262; *White v. The State*, 13 Texas, 183); which is felony or misdemeanor according as that for which the escaping prisoner was confined is the one or the other (*Weaver v. Com.*, 29 Penn. St. [5 Casey] 445; 2 Bish. Crim. Law, § 1105); and at the common law it is to receive the same punishment. Ib.

It is unnecessary to prove negligence in the defendant; the law implies it. See *Blue v. Com.*, 4 Watts (Penn.), 215. And it is held that nothing but the act of God or public enemies will be an excuse. *State v. Halford*, 6 Rich. (S. C.) 58.

A jailor's deputies are held to the same degree of responsibility as the jailor himself; but the mere servants of the jailor (who are not deputies), are responsible only for negligence in their particular spheres, or for connivance. *State v. Erickson*, 3 Vroom (N. J.), 421. See *Kavanaugh v. State*, 41 Ala. 399; 2 Whart. Crim. Law, § 2609.

(655) See *Com. v. Briggs*, 5 Metc. (Mass.) 559. To constitute the offense of prison breach, the breaking need not be from a public prison. If force be used it is a breach of prison to escape from an officer in the streets. See *Luckey v. State*, 14 Texas, 400; *State v. Doud*, 7 Conn. 884.

When the imprisonment is unlawful the offense is not perpetrated, even though the prison is broken. But where the imprisonment is lawful, the question of the defendant's guilt or innocence has no bearing whatever on the issue. *Com. v. Miller*, 2 Ashm. (Penn.) 61. See *People v. Washburn*, 10 Johns. 160.

An indictment lies for an unsuccessful attempt at prison breach. *People v. Rose*, 12 Johns. 339.

Where the breaking out is felony, a person supplying means whereby it is effected, or who waits to carry off the prisoner after the escape, is accessory before or after the fact, as the case may be. In case the breaking out is a misdemeanor, the person so assisting is a principal in the misdemeanor. *People v. Tompkins*, 9 Johns. 70; 2 Whart. Crim. Law, § 2615, b.

VI. Rescue is the forcibly and knowingly freeing another from arrest or imprisonment; and for this offence against public justice the party rescuing

VI. *Rescue.* may be punished as guilty of a misdemeanor, although the principal or person rescued be not convicted (*a*). If, however, the person rescued be convicted, it is generally the same offence in * the [* 144] stranger so rescuing, as it would have been in a gaoler to have voluntarily permitted an escape. A rescue, therefore, of one apprehended for felony, is felony; for treason, treason; and for a misdemeanor, a misdemeanor also. But here likewise, as upon voluntary escapes, the principal must first be attainted, or receive judgment before the rescuer can be thus punished; and for the same reason; because perhaps in fact it may turn out that there has been no offence committed (*b*). (656)

Having reference to the offence before us, the undermentioned enactments must be noticed:—

By statute 16 Geo. 2, c. 31, s. 2, to convey to any prisoner in custody for treason or felony any arms, instruments of escape or disguise, without the knowledge of the gaoler, though no escape be attempted, or in any way to assist such prisoner to attempt an escape, though no escape be actually made, is felony, and under the statute 28 & 29 Vict. c. 126, s. 37, for this offence the punishment is imprisonment with hard labour for a term not exceeding two years.

By statute 25 Geo. 2, c. 37, s. 9, the rescuing or attempting to rescue out of prison any person committed for or found guilty of murder, or any murderer going to or during execution, was made felony.

By the 28 & 29 Vict. c. 126, s. 37, the aiding a prisoner in escaping or attempting to escape from prison, or the conveying into prison with intent to facilitate the * escape of a prisoner any mask, disguise, letter, or [* 145] other thing, is likewise felony (*c*).

And by the 5 Geo. 4, c. 84, s. 22, the rescuing, or attempting to rescue, or assisting in rescuing a person sentenced to transportation, banishment, or penal servitude (*d*), who, having been found unduly at large, has been retaken, and is in custody of any officer, to be reconveyed to prison; or causing to be conveyed any disguise, to such offender, is punishable in the same manner as if such person had been confined in a prison.

(*a*) 2 Hawk. P. C. c. 31, s. 8. See 14 & 15 Vict. c. 100, s. 29.

(*b*) 1 Hale, P. C. 607; Fost. 844.

Before the passing of the 1 & 2 Geo. 4, c. 88, s. 1, the rescuing a person under a commitment for a felony was not a transportable offence, but was punishable only as a felony within clergy at common law. By that act, however, the rescuing or aiding the rescue of a person charged with or committed for felony, or on suspicion thereof, is, if the person rescuing be convicted, and would have been,

before the passing of the act, liable to imprisonment, not exceeding one year, punishable with penal servitude for seven or not less than five years,—or imprisonment with hard labour for not less than one, and not more than three years. See 20 & 21 Vict. c. 8, s. 2; 27 & 28 Vict. c. 47, s. 2.

(*c*) Punishment; imprisonment with hard labour for not more than two years.

(*d*) See stats. 16 & 17 Vict. c. 99, s. 7; 20 & 21 Vict. c. 8, s. 2; 27 & 28 Vict. c. 47.

(656) See *State v. Cuthbert*, T. U. P. Charl't. (Ga.) 13. The offence is consummated by wresting a prisoner violently from custody, even though the prisoner take no part in the violence. *Ib*.

It is no offence to rescue a prisoner from the hands of a private person unless the rescuer knows that the person rescued was under some arrest. *State v. Hilton*, 26 Mo. 199.

An attempted rescue, which proves unsuccessful, is an indictable offence. *State v. Murray*, 15 Me. 100.

VII. Another offence against public justice is the returning from transportation, or being seen at large in Great Britain, before the expiration of the term for which the offender was transported, or sentenced to penal servitude (e).

VII. Returning from transportation, &c.

VIII. An eighth offence to be here noticed is that of taking a reward, under pretence of helping the owner to his stolen goods. This was a contrivance carried to a great length of villany in the beginning of the reign of George I.: the confederates of the felons thus disposing of stolen goods, at a cheap rate, to the owners themselves, and thereby stifling all further inquiry. The notorious Jonathan Wild had under him a well-disciplined corps of thieves, who brought in all their spoils to him: and he kept a sort of public office for restoring them to the owners at half price. To prevent which audacious practice, to the ruin and in defiance of public justice, it was enacted by statute 4 Geo. 1, c. 11, that whoever shall [* 146] * take a reward under the pretence of helping any one to stolen goods, shall suffer as the felon who stole them; unless he causes such principal felon to be apprehended and brought to trial, and also gives evidence against him. Wild, still continuing in his old practice, was upon this statute at last convicted and executed (f).

VIII. Taking reward to help to stolen goods.

With the view of promoting a due administration of justice by the prosecution of offenders, certain provisions having reference to the restitution and recovery of stolen property are included in the Larceny Act (g);—

1st. If any person guilty of any such felony or misdemeanor as in that Act mentioned, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, be indicted for such offence, by or on behalf of the owner of the property, his executor or administrator, and convicted thereof, the property shall be restored to the owner or his representative; and the court before whom the offender is tried may award from time to time writs of restitution for the said property, or may order the restitution thereof in a summary manner (h).

2ndly. Whosoever shall corruptly take any money or reward, directly or [* 147] indirectly, under pretence or upon * account of helping any person to any chattel, money, valuable security, or other property which has by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, as in the Larceny Act before mentioned, shall (unless

(e) 5 Geo. 4, c. 84, s. 22; 20 & 21 Vict. c. 3, s. 2; 27 & 28 Vict. c. 47. Punishment: penal servitude for life, or for not less than five years, with previous imprisonment for any term not exceeding four years, or imprisonment with or without hard labour for not more than two years.

(f) See stat. 6 Geo. 1, c. 23, s. 9.

(g) 24 & 25 Vict. c. 96.

(h) S. 100, which provides that if it shall appear before any award or order made that any valuable security has been *bond fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument has been *bond fide*

taken or received by transfer or delivery, by some person or body corporate, for consideration, without notice or reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, the court shall not award or order the restitution of such security; and further, that nothing in the above section contained shall apply on the prosecution of any trustee, or agent intrusted with the possession of goods or documents of title to goods for any misdemeanor against the Larceny Act. See 30 & 31 Vict. c. 35, s. 9.

he has used due diligence to cause the offender to be brought to trial for the same) be guilty of felony (i).

IX. Receiving of stolen goods, knowing them to be stolen, is sometimes a felony and sometimes a misdemeanor, and may be viewed as an affront to public justice; this offence will, however, be more conveniently considered hereafter (k), in connection with that of larceny, to which it is closely allied.

By stat. 32 & 33 Vict. c. 99, s. 11, it is, *inter alia*, enacted that where any person who has been previously convicted of an offence such as hereafter specified (a), and "involving fraud or dishonesty, is found in the possession of stolen goods, evidence of such previous conviction shall be admissible as evidence of his knowledge that such goods have been stolen; and in any proceedings that may be taken against him as receiver of stolen goods, or otherwise in relation to his having been found in possession of such goods, proof may be given of his previous conviction before evidence is given of his having been found in possession of such stolen goods; provided that not less than seven days' notice shall be given to such person that proof is intended to be given of his previous conviction, and that he will be deemed to have known such goods to have been stolen until he has proved the contrary.

"Moreover, where proceedings are taken against any person for having in his possession stolen goods, evidence may be given that there were found in the possession of such person other goods stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the goods to be stolen which form the subject of the proceedings taken against him."

X. Of a nature somewhat similar to the two last offences is that of theft-bote, which is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. **X. Theft-bote.** This is frequently called compounding of felony, and formerly was held to make a man an accessory, but is now punished only with fine and imprisonment (l). This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment. And the Salic law, "*latroni eum similem habuit, qui furtum celare vellet, et occultè sine judice compositionem ejus admittere*" (m). And with us, by the Larceny Act (n), it is provided that whosoever publicly advertises a reward for the return of property stolen or lost, and in such advertisement uses any words purporting that no questions will be asked, or * makes use of any words in any public advertisement purporting that a reward will be given or paid [* 148] for property stolen or lost, without seizing or making any inquiry after the person producing such property, or promises or offers in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon such property the money so paid or advanced, or any other sum of money or reward for the return thereof,

(i) S. 101. Punishment: penal servitude for any term not exceeding seven, and not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and, if a male under the age of eighteen years, with or without whipping.

As to taking money to restore stolen dogs, see 24 & 25 Vict. c. 96, s. 20.

(k) *Post*, chap. 14.

(l) 1 Hawk. P. C. 125.

(m) *Stiernh. de Jure Goth.* l. 3, c. 5.

(n) 24 & 25 Vict. c. 96, s. 102.

or prints or publishes any such advertisement, shall forfeit £50 for every such offence, to be recovered, with full costs of suit, by any person suing for the same. (657)

XI. Analogous to the preceding offence is misprision of felony, *i.e.*, the concealment of a felony which a man knows of, but never assented to: for if he assented to it, this makes him either principal or accessory. The punishment of this misprision in a public officer, by the statute Westm. 1, 3 Edw. 1, c. 9, is imprisonment for a year and a day; in a common person, imprisonment for a less discretionary time; and, in both, fine and ransom at the pleasure of the crown: which pleasure must be observed, once for all, not to signify any extrajudicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice; "*voluntas regis in curia, non in camera*" (o). (658)

XII. Common barratry is the offence of frequently (p) exciting and stirring up suits and quarrels between her majesty's subjects, either at law or otherwise (q). (659) The punishment of this offence, in a common person, is by fine and imprisonment: but if the offender (as is too frequently the case) belongs to the profession of the law, a barrator, who is [* 149] thus able as well as willing to do * mischief, ought also to be disabled from practising for the future (r). And indeed it is enacted by stat-

(o) 1 Hale, P. C. 375. (q) 1 Hawk. P. C. 248.
(p) A man cannot be guilty of barratry in (r) *Ibid.* 244.
respect of a single act. Hawk. P. C. b. 1, c.
81, s. 5.

(657) The compounding of a felony or other crime is an indictable offense, and no action can be supported on any contract of which such offense is the consideration, either in whole or in part. *Hinesburg v. Sumner*, 9 Vt. 23; *Bell v. Wood*, 1 Bay (S. C.), 244; *Com. v. Pease*, 16 Mass. 91; *Plumer v. Smith*, 5 N. H. 558. See *Bothwell v. Brown*, 51 Ill. 234.

The composition of misdemeanors is illegal as much as that of felonies. *Jones v. Rice*, 18 Pick. (Mass.) 440. But the mere taking of one's goods back again, or receiving reparation, is no offense, if no favor is shown or agreed to be shown to the thief. *Plumer v. Smith*, 5 N. H. 558.

The conviction of the principal offender is not necessary in order to sustain an indictment for compounding the offense. *People v. Buckland*, 13 Wend. 592.

(658) As to misprision of treason, see *ante*, 390, note 646; *ante*, 350, note 620. Misprision of felony is regarded as a common-law offense in all the States where common-law offenses are known; but misprision of misdemeanor is unknown either in the language or facts of the law. 1 Bish. Cr. Law, §§ 275, 717. See *Marbury v. Brooks*, 7 Wheat. 556, 575.

An attorney may be required to disclose any communication made to him, to obtain professional advice or assistance, as to the commission of a felony or other crime which is *malum in se*. Such communication is not privileged. *People v. Blakeley*, 4 Park. 176.

(659) The indictment must charge the offender with being a "common barrator," and it seems that three instances of offending, at least, must be shown. See *Com. v. Tubbs*, 1 Cush. (Mass.) 2; *Com. v. McCulloch*, 15 id. 227; *Com. v. Davis*, 11 Pick. (Mass.) 432; *The State v. Chitty*, 1 Bailey (S. C.), 379.

A justice of the peace may be indicted, as a common barrator, for exciting criminal prosecutions to be brought before himself as magistrate; and it is not a sufficient defense, that the prosecutions were not groundless, if they were promoted by the justice, with a view to exacting fees for afterward suppressing them. *State v. Chitty*, 1 Bailey (S. C.), 379.

The offense is a common-law misdemeanor, punishable by fine and imprisonment at the discretion of the court; and in case the offender be an attorney or counselor at law, he ought to be further punished by being disabled to practice for the future. *Ib.*

ute 12 Geo. 1, c. 29 (made perpetual by 30 & 31 Vict. c. 59), that if any one who has been convicted of forgery, perjury, subornation of perjury, or common barratry, shall practice as an attorney, solicitor, or agent, in any suit; the court, upon complaint, shall examine it in a summary way; and, if proved, the offender is punishable as below mentioned (s). Hereunto may also be referred another offence, of equal malignity and audaciousness; that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by statute 8 Eliz. c. 2, s. 4, to be punished by six months imprisonment, and treble damages to the party injured.

XIII. Maintenance is an offence that bears a near relation to the former; being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it (t): a practice that was greatly encouraged by the first introduction of uses (u). This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. And therefore, by the Roman law, it was a species of the *crimen falsi* to enter into any confederacy, or do any act to support another's lawsuit, by money, witnesses, or patronage (x). A man may however maintain the suit of his near kinsman, * servant, [* 150] or poor neighbour, out of charity and compassion, with impunity. Otherwise the punishment by common law is fine and imprisonment (y); and by the statute 32 Hen. 8, c. 9, a forfeiture of ten pounds (z). (660)

(s) Punishment: penal servitude for a period not exceeding seven, nor less than five, years.

(t) 1 Hawk. P. C. 249.

(u) Dr. & St. 202.

(x) Dig. 48, 10, 20.

(y) 1 Hawk. P. C. 255.

(z) And see stat. 1 Ric. 2, c. 4.

(660) The doctrine of maintenance is founded upon the principle that "combinations against individuals are dangerous in themselves, and prejudicial to the public interests. It is no wrong for an individual to prosecute his rights against another in a court of justice; but it is, notwithstanding, criminal for others to maintain him in his suit; and for the reason that maintenance tends to oppression; that the weak would be endangered by combinations of the powerful and wealthy. *Lambert v. The People*, 9 Cow. 578, 600; and see *Luthrop v. Amherst Bank*, 9 Metc. (Mass.) 489, 492; *Rust v. Larue*, 4 Litt. 411, 426; *Thalhimer v. Brinckerhoff*, 8 Cow. 623.

Assisting another with money or advice to carry on his cause is an indictable offense; unless the person thus maintaining has some interest in the subject of the suit, or is connected with the suitor in some social relation. See *Campbell v. Jones*, 4 Wend. 306; *Luthrop v. Amherst Bank*, 9 Metc. (Mass.) 489; *Wickham v. Conklin*, 8 Johns. 20; *Cummins v. Latham*, 4 T. B. Monr. (Ky.) 97, 105; *Knight v. Sawin*, 6 Greenl. (Me.) 361; *Godspeed v. Fuller*, 46 Me. 141; *Williamson v. Sammons*, 34 Ala. 691; *McCall v. Capehart*, 20 id. 521. Under some circumstances, landlords and tenants, masters and servants, and even neighbors may lawfully assist one another in carrying on a suit. *Thalhimer v. Brinckerhoff*, 8 Cow. 623. So, it is held that, advancing money to a poor man to enable him to prosecute his suit, is not maintenance. See *id.*; *Perins v. Dunn*, 8 Johns. Ch. 508; *Bristol v. Dann*, 12 Wend. 142.

Maintenance is not recognized as an offense by the laws of California. *Matthewson v. Fitch*, 22 Cal. 86.

XIV. Champerty, *campi partitio*, is a species of maintenance, and punished in the same manner (a): being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, *XIV. Champerty*. if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense (b). Thus *champart*, in the French law, signifies a similar division of profits, being a part of the crop annually due to the landlord by bargain or custom. In our sense of the word it signifies the purchasing of a suit, or right of suing: a practice so much abhorred by our law, that it is one main reason why a chose in action, or thing of which one hath the right but not the possession, is not assignable at common law; because no man should purchase any pretence to sue in another's right (c). (661) Those pests of civil society, who are perpetually endeavouring to disturb the repose of their neighbours, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law, "*qui improbe coeunt in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Julia de vi privata tenentur*" (d); and they were punished by the forfeiture of a third part of their goods, and perpetual infamy. Hitherto also must be referred the provision of the statute 32 Hen. 8, c. 9, that no one shall sell or purchase any [* 151] pretended right or * title to land, unless the vendor has received the profits thereof for one whole year before such grant, or has been in actual possession of the land, or of the reversion or remainder; on pain that both purchaser and vendor shall each forfeit the value of such land to the crown and the prosecutor. These offences relate chiefly to the commencement of civil suits; but

XV. The compounding of information upon penal statutes is an offence of an equivalent nature in criminal causes; and is, besides, an additional misde-

(a) 1 Hawk. P. C. 257.

(b) Stat. of Conspirat. 83 Edw. 1.

(c) If an attorney prosecute an action, to be paid his costs by a gross sum commensurate

with his trouble, and with the benefit obtained, this would amount to champerty.

Earle v. Hopwood, 9 C. B. N. S. 566.

(d) Dig. 48, 7, 6.

(661) Champerty, like maintenance, is indictable at common law. The offense consists in the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute, or some profits out of it; and it covers all transactions and contracts, whether by counsel or others, to have the whole or part of the thing or damages recovered. *Lathrop v. Amherst Bank*, 9 Metc. (Mass.) 489; *Holloway v. Lowe*, 7 Port. (Ala.) 488; *Brown v. Beauchamp*, 5 T. B. Monr. (Ky.) 416; *Thurston v. Percival*, 1 Pick. (Mass.) 416; *Barnes v. Strong*, 1 Jones' Eq. (N. C.) 100; *Wheeler v. Pounds*, 24 Ala. 472; *Douglass v. Wood*, 1 Swan. (Tenn.) 393. The offense may be committed though there has been no suit actually commenced. *Rust v. Larue*, 4 Litt. (Ky.) 411; see *Martin v. Amos*, 13 Ired. (N. C.) 201.

A champertous agreement by an attorney at law with a client is void. See *Holloway v. Lowe*, 7 Port. (Ala.) 488; *Byrd v. Oden*, 9 Ala. 755; *Key v. Vattier*, 1 Ohio, 132; *Scoby v. Ross*, 13 Ind. 117; and see cases cited above.

In New York and some of the other States, the law as to maintenance and champerty is not in force, except as regulated by statute. See *Sedgwick v. Stanton*, 14 N. Y. (4 Kern.) 289; *Voorhees v. Dorr*, 51 Barb. 590; *Lowe v. Hutchinson*, 37 Me. 196; *Newkirk v. Cone*, 18 Ill. 449; *Stoddard v. Miz*, 14 Conn. 12; *Davis v. Sharron*, 15 B. Monr. (Ky.) 64. See, also, *Mullen v. Guest*, 6 Texas, 275; *Danforth v. Streeter*, 28 Vt. 490; *Wright v. Meek*, 3 Greene (Iowa), 472; *Key v. Vattier*, 1 Ohio, 132.

XV. Compound-
ing informa-
tions.

meanor against public justice, by contributing to make the laws odious to the people (e). At once therefore to discourage malicious information, and to provide that offences, when once discovered, shall be duly prosecuted, it was enacted by statute 18 Eliz. c. 5, s. 4, that if any person, informing under pretence of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him (which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not for the public good), he shall *inter alia* forfeit 10*l.*, and shall be for ever disabled to sue on any popular or penal statute (f). (662)

The above enactment does not apply to offences cognizable only before magistrates (g), but the taking of the amount of penalty imposed is an offence within its provisions, although there be no action or proceeding pending for it, and although in fact no offence liable to the penalty have been committed (h).

Moreover, where an offence involves damage to an *injured party [* 152] for which he may maintain an action, it is competent for him, notwithstanding the public nature of the offence, to comprise or settle his private damage as he may think fit (i); and it is not uncommon, when a person has been convicted of a misdemeanor, which principally and more immediately affects some individual, as a battery, imprisonment, or the like, for the court to permit the defendant to 'speak with the prosecutor,' before any judgment is pronounced; and if the prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuity of a civil action.

XVI. The crime of conspiracy is complete if two or more than two persons agree to do an illegal thing: that is, to effect something in itself unlawful, or to effect by unlawful means something which in itself may be

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to pervert the
course of justice.

indifferent or even lawful (k). Such a combination or agreement may be with a view to obstructing, perverting, or defeating the course of public justice (l). Thus a conspiracy to indict an innocent man of felony, falsely and maliciously, who is accordingly indicted and acquitted, is a manifest abuse of public justice (m); for which the party injured may have

(e) *Collins v. Blantern*, 1 Smith L. C. 6th ed. 325, and Note thereto; *Keir v. Leeman*, 9 Q. B. 371; 6 Id. 808.

(f) The punishment for the above offence is now fine or imprisonment, or both, as the court shall think fit. See 56 Geo. 3, c. 138.

(g) *R. v. Orsop*, 1 B. & Ald. 282.

(h) *R. v. Gotley*, Russ. & R. C. C. 84; *Reg. v. Best*, 2 Mood. C. C. 124.

(i) Judgment, *Keir v. Leeman*, 9 Q. B. 305.

(k) Per Tindal, C. J., delivering the opinion of the judges, in *O'Connell v. Reg.*, 11 Cl. & F. 155.

(l) *R. v. Maubey*, 6 T. R. 619; *Reg. v. Hamp*, 6 Cox, C. C. 167.

(m) It is no excuse for a conspiracy to carry on a malicious prosecution, that the indictment preferred was insufficient, or that the court before which it was taken had no jurisdiction to try it, although in consequence of these circumstances the party was really never brought into danger. 1 Hawk. P. C. c. 72, s. 8. Nor will it avail the defendant that he intended only to give evidence on a trial not then commenced, for the law makes the mere intent in such case criminal. If, how-

(662) The compounding of penalties is said to be "an offense at common law, of dangerous tendency, highly derogatory to public example, and prosecutions are no more to be improperly suppressed by public informing officers than by common informers. And all bonds or notes, into the consideration of which the compounding of a felony or the suppression of a prosecution therefor in any part enters, are void and incollectible." *Town of Hinesburgh v. Sumner* 9 Vt. 23.

[* 153] a civil action (n), (663) or * the conspirators, for there must be at least two to form a conspiracy, may be indicted at the suit of the crown, and were by the ancient common law (o) to receive what was called the villenous judgment; viz. to lose their *liberam legem*, whereby they were dis-

ever, the principal charge is in progress, it may be proper to apply to the court to defer the judicial investigation of the conspiracy till that is decided. *Ibid.* s. 4.

(n) *Ante*, vol. iii.

(o) Bro. Abr. tit. Conspiracy, 28.

(663) The gist of a conspiracy is the unlawful confederacy to do an unlawful act, or a lawful act for an unlawful purpose. *Collins v. Com.*, 8 Serg. & R. (Penn.) 220; *Com. v. Judd*, 2 Mass. 337; *State v. Buchanan*, 5 Harr. & J. (Md.) 817; *State v. Burnham*, 15 N. H. 396; *State v. Rowley*, 12 Conn. 101. The offense is complete when the confederacy is made, and no overt acts need be alleged or proved. *State v. Pulle*, 12 Minn. 164; *State v. Straw*, 42 N. H. 393; *Isaacs v. State*, 48 Miss. 234; *Com. v. Corties*, 8 Phila. (Penn.) 450; *People v. Mather*, 4 Wend. 259. And see *State v. Norton*, N. J. L. (3 Zab.) 33.

A conspiracy is a joint offense, and less than two persons cannot be accused of it. *Com. v. Manson*, 2 Ashm. (Penn.) 31; *Com. v. Irwin*, 8 Phila. (Penn.) 330; *United States v. Cole*, 5 McLean's C. C. 513. A husband and wife, being regarded legally as one, cannot be accused of the offense; but they may be jointly indicted for the offense, if there is also another conspirator. *State v. Covington*, 4 Ala. 603; *Com. v. Woods*, 7 Law Rep. 53. See *Kirtley v. Deck*, 2 Munf. (Va.) 15.

Among indictable conspiracies are the following: A conspiracy to commit an assault and battery (*Com. v. Partman*, 29 Penn. St. 296); to obtain goods by false pretenses (*Johnson v. People*, 23 Ill. 814); to cheat an individual of real estate, as well as of personal property (*People v. Richards*, 1 Mich. 216. And see *Com. v. Warren*, 6 Mass. 74; *Com. v. Ward*, 1 id. 473; *Lambert v. People*, 7 Cow. 166); to cheat one by making him drunk and playing falsely at cards with him (*State v. Younger*, 1 Dev. [N. C.] 357); to seduce a female (*Smith v. People*, 25 Ill. 17; *State v. Murphy*, 6 Ala. 765; *Anderson v. Com.*, 5 Rand. [Va.] 626; *Respublica v. Hevise*, 2 Yeates [Penn.] 114); to procure criminal process for improper purposes (*Stomer v. People*, id. 70); or to commit a felony or misdemeanor, or any act that is criminal. *People v. Mather*, 4 Wend. 265; *Com. v. Kingsbury*, 5 Mass. 106; *State v. Buchanan*, 5 Harr. & J. (Md.) 817. So all conspiracies to injure others, by preventing, obstructing, or defeating the course of public justice, by fabricating or suppressing evidence, are indictable. *State v. De Witt*, 2 Hill (S. C.), 282; *State v. Noyes*, 25 Vt. 415.

If a client and attorney enter into a conspiracy to resist an officer in performing his duty, both are equally guilty. *U. S. v. Smith*, 1 Dill. 212.

As to conspiracies to raise or depress the price of labor, etc., see *State v. Donaldson*, 32 N. J. L. 151; *People v. Fisher*, 14 Wend. 9; *Master Stevedore's Ass. v. Walsh*, 2 Daly, 1; *Com. v. Hunt*, 4 Metc. (Mass.) 111; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173.

A conspiracy to commit a higher offense merges in that offense, if committed; but in case of a conspiracy to commit a crime of the same grade, there is no merger. *State v. Mayberry*, 48 Me. 218. See *State v. Murray*, 15 id. 100; *State v. Noyes*, 25 Vt. 415; *People v. Richards*, 1 Mich. 216; *People v. Mather*, 4 Wend. 229.

In some of the States the subject of conspiracy is regulated by statute. As to Maine, see *State v. Hewett*, 31 Me. 386; id. 396; Pennsylvania, *Olary v. Com.*, 4 Barr, 210; New York, *People v. Fisher*, 14 Wend. 9; *Scott v. People*, 62 Barb. 62, 83; New Jersey, *State v. Norton*, 3 Zab. 33. So there are some statutory conspiracies created by the laws of the United States, as to which see *U. S. v. Cole*, 5 McLean, 513; *U. S. v. Hand*, 6 id. 274.

A conspiracy is only a misdemeanor, even where its object is the commission of a felony (*People v. Mather*, 4 Wend. 229, 265); and is punishable at common law by fine and imprisonment, or either, in the discretion of the court. See *State v. Roberts*, 1 Hayw. (N. C.) 176. As to the punishment of the offense in Pennsylvania, see *Olary v. Com.*, 4 Barr, 210; *Williams v. Com.*, 10 Casey, 178; *Hartmann v. Com.*, 5 Barr, 60.

A mere conspiracy, however atrocious, cannot be the subject of a civil action, unless it results in actual damage. *Harron v. Hughes*, 25 Cal. 555; *Kimball v. Harman*, 34 Md. 407. But if any damage is sustained in consequence of the conspiracy, an action lies, though the act which was designed be not done. *Patten v. Gurney*, 17 Mass. 186.

credited and disabled as jurors or witnesses; to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses rased, their trees rooted up, and their own bodies committed to prison (*p*). But the villenous judgment has by long disuse become obsolete; and instead thereof the delinquents are usually sentenced to imprisonment and fine (*q*).

Conspiracy, regard being had to its object, may be viewed as directed against the public peace, or against the person or the property of an individual, and will accordingly be again mentioned in ensuing chapters (*r*).

XVII. The next offence against public justice may occur when the suit is past its commencement, and come to trial. And that is the crime of wilful and corrupt perjury; which is defined by Sir Edward Coke (*s*),
XVII. Perjury and subornation of perjury.
 some judicial proceeding, to a person who swears wilfully, absolutely, and falsely, in a matter material to the issue or point in question.

Our common law takes no notice of any perjury but such as is committed in some court of justice, having power to administer an oath; or before a magistrate or other officer, invested with a similar authority, in some proceeding relative to a civil suit or a criminal prosecution: for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. (664)

(*p*) 1 Hawk. P. C. 193.

(*q*) See also 14 & 15 Vict. c. 100, s. 29.

(*r*) See particularly Chap. 18, in which also is considered the offence of sending letters

threatening to accuse any person of a crime. As to a conspiracy to commit murder, *post*, chap. 18.

(*s*) 3 Inst. 164.

(664) Perjury, as defined by an American judge, "is a corrupt, willful, false oath, taken in a judicial proceeding, in regard to a matter or thing material to a point involved in the proceeding. The oath must be taken before some officer or court having authority to administer it," *PETERS, J. Hood v. State*, 44 Ala. 81, 86. And see *Hopkins v. Smith*, 3 Barb. 599; *Martin v. Miller*, 4 Mo. 47; *Pankey v. People*, 1 Scam. (Ill.) 80; *People v. Collier*, 1 Mann. (Mich.) 137; *State v. Tappan*, 1 Foster (N. H.), 56; *Pickering's Case*, 8 Gratt. (Va.) 628; *Jackson v. State*, 1 Carter (Ind.), 184; *McGregor v. State*, id. 232; *Bernie v. State*, 19 Ala. 23.

Form of oath. Where the form of the oath is prescribed by statute, it must be substantially followed; but mere verbal deviations therefrom do not exempt the person swearing from the pains of perjury. *State v. Dayton*, 3 Zab. (N. J.) 49; *State v. Gates*, 17 N. H. 373; *Maher v. State*, 2 Minn. 444; *Sharp v. Wilhite*, 2 Humph. (Tenn.) 434; *Ashburn v. State*, 15 Ga. 246. Where a statute requires testimony to be taken in writing, and, contrary to the statute, it is received orally, no indictment for perjury will lie upon it. *State v. Trask*, 42 Vt. 152. See *State v. Helle*, 2 Hill (S. C.), 290.

The terms "corporal oath" and "solemn oath" are equivalent; and an oath taken with the hand uplifted is properly described by either term in an indictment for perjury. *Jackson v. State*, 1 Carter (Ind.), 154. See *State v. Norris*, 9 N. H. 96. An oath administered upon a book other than the holy evangelists, the witness and the administering tribunal both supposing it to be the Bible, is a valid oath, and binding upon the witness. *People v. Cook*, 8 N. Y. (4 Seld.) 67, 84. And see *Com. v. Buzzell*, 16 Pick. (Mass.) 153; *Com. v. Knight*, 12 Mass. 274; *Campbell v. People*, 8 Wend. 636.

Voluntary and incompetent witness. It is not necessary to sustain an indictment for perjury that the witness should have been served with a subpoena, or that he be compellable to testify. The mere fact of his testifying under oath, whether reluctantly or voluntarily, is sufficient. *Com. v. Knight*, 12 Mass. 274. So it is a general rule that a witness who willfully testifies falsely as to a material fact is guilty of perjury, though he was not a competent witness in the case (*Chamberlain v. People*, 23 N. Y. [9 Smith] 85); and the rule is applicable even in a case where a party becomes a witness for himself, under circumstances in which his testimony is not by law receivable. *Ib.*; *Montgomery v. State*, 10 Ohio, 220; *Res. v. Newell*, 8 Yeates (Penn.), 417; *State v. Moiser*, 1 Dev. (N. C.) 263; *State v. Keene*, 26

[* 154] * The legislature has indeed interfered to repress the inconvenience adverted to by the statute 5 & 6 Will. 4, c. 62 (*l*), of which sect. 13 recites, that a practice had prevailed of administering and receiving oaths and

(*l*) By which a declaration is, in various cases therein specified, substituted for an oath.

Me. 33; *Van Steenberg v. Korts*, 10 Johns. 167; *Haley v. McPherson*, 8 Humph. (Tenn.) 104; *Sharp v. White*, 2 id. 434. But see *State v. Hamilton*, 7 Mo. 300.

Tribunal administering oath. To constitute perjury, the tribunal or magistrate must have jurisdiction of the case in which the false oath was taken (*Arden v. State*, 11 Conn. 408; *State v. Fassett*, 16 id. 457; *Pankey v. State*, 1 Scam. [Ill.] 80; *Weston v. Lumley*, 33 Ind. 486; *State v. Furlong*, 26 Me. 69; *State v. Gallimon*, 2 Ired. [N. C.] 374; *Steinson v. State*, 6 Yerg. [Tenn.] 531; *State v. McCroskey*, 3 McCord [S. C.], 305; and the oath must be administered by one having legal authority. *Ib.*; *Morrell v. People*, 32 Ill. 499; *McGregor v. State*, 1 Smith (Ind.), 179. See *Muir v. State*, 8 Blackf. (Ind.) 154; *Mahan v. Berry*, 5 Mo. 21. But an oath administered by a clerk in presence of the court is a swearing by the court. See *Seroer v. State*, 2 Blackf. (Ind.) 35; *State v. Gregory*, 2 Murph. (Tenn.) 69; *State v. Hascall*, 6 N. H. 358.

If the court has jurisdiction of the subject-matter, perjury may be committed, although the proceedings be not strictly regular. *State v. Lavalley*, 9 Mo. 824; see *Van Steenberg v. Korts*, 10 Johns. 167; *State v. Hall*, 7 Blackf. (Ind.) 25. As to perjury before an ecclesiastical tribunal, see *Chapman v. Gillet*, 2 Conn. 40. It is perjury to testify falsely before a grand jury (*Com. v. Pickering*, 8 Gratt. [Va.] 628; *State v. Fussett*, 16 Conn. 457; *Com. v. Parker*, 2 Cush. [Mass.] 212; *State v. Offut*, 4 Blackf. [Ind.] 355); or, under the insolvent debtor's act (*Com. v. Calvert*, 1 Va. Cas. 181; see *Res. v. Wright*, 1 Yea. [Penn.] 205); or, after a conviction, on the question of mitigation of sentence (*State v. Keenan*, 8 Rich. [S. C.] 456); or, in aid of a petition for a writ of *habeas corpus*. *White v. State*, 1 Smed. & M. (Miss.) Ch. 149. So, if a person brought before the tribunal to serve as a juror, answers corruptly in reply to questions proposed by the judge as to his competency, it is perjury. *State v. Wall*, 9 Yerg. (Tenn.) 347; *State v. Moffot*, 7 Humph. (Tenn.) 250. And a false oath taken in proceedings before referees (*State v. Keene*, 26 Me. 38); or, on a motion for a continuance (*State v. Shupe*, 16 Iowa, 36; *State v. Flagg*, 27 Ind. 24; *Morrell v. People*, 32 Ill. 499); or, in justifying bail in any of the courts (*State v. Lavalley*, 9 Mo. 824); or, in answer to a bill in equity (*Com. v. Warden*, 11 Metc. [Mass.] 406), is perjury.

False swearing in a naturalization proceeding is perjury at common law, and may be punished as such by indictment in a State court. *Rump v. Com.*, 30 Penn. St. 475; *State v. Whittemore*, 50 N. H. 245; but see *People v. Sweetman*, 3 Park. 358.

Must be in a judicial proceeding. To sustain an indictment for perjury, it must appear that the false swearing was in a judicial proceeding. *State v. Simons*, 30 Vt. 620; *State v. Chamberlain*, id. 559; *Com. v. Warden*, 11 Metc. (Mass.) 406. No extra judicial oath will sustain an indictment for the offense. *Jackson v. Humphrey*, 1 Johns. 498; *Pegram v. Styron*, 1 Bailey (S. C.), 595; *Waggoner v. Richmond*, Wright (Ohio), 178; *Lamden v. State*, 5 Humph. (Tenn.) 83. Nor can the offense be committed in an official oath. *State v. Dayton*, 3 Zab. (N. J.) 49. See *State v. Stephenson*, 4 McCord (S. C.), 165; *Chapman v. Gillet*, 2 Conn. 40; *Arden v. State*, 11 id. 408.

But false swearing, though not technically perjury, may nevertheless be at common law indictable as an independent misdemeanor, when the oath is taken to secure a juridical right. 2 Whart. Cr. Law, § 2198; and see *Rump v. Com.*, 30 Penn. St. 475.

Materiality of the testimony. A false oath as to a matter not material to the issue will not sustain an indictment for perjury. *Nelson v. State*, 47 Miss. 621; *State v. Bowler*, 3 Heisk. (Tenn.) 29; *Bullock v. Koon*, 4 Wend. 531; *State v. Dodd*, 3 Murph. (N. C.) 226; *Com. v. Knight*, 12 Miss. 274; *State v. Flagg*, 25 Ind. 243; *State v. Bailey*, 34 Mo. 350; *Pankey v. People*, 1 Scam. (Ill.) 80. Thus, an allegation, in an application for an attachment, or for a writ of *habeas corpus*, of something not required to be alleged, although false, is not perjury. *Hood v. State*, 44 Ala. 81; *Gibson v. State*, id. 17; *White v. State*, 1 Smed. & M. (Miss.) 149. But to constitute the offense, the evidence need not affect the main issue, but only a collateral one. *State v. Lavalley*, 9 Mo. 824; *State v. Shupe*, 16 Iowa, 36; *State v. Keenan*, 8 Rich. (S. C.) 456; *Com. v. Pollard*, 12 Metc. (Mass.) 225; *Floyd v.*

affidavits voluntarily taken and made in matters not the subject of judicial inquiry, nor in anywise pending or at issue before the justice of the peace or other person by whom such oaths or affidavits had been administered or received; and that doubts had arisen whether or not such practice were legal; and for the more effectual suppression of such practice and removal of such doubts, enacts that it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath no jurisdiction or cognisance by some statute in force at the time being (*u*).

(*u*) The section provides, however, that nothing therein contained "shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the houses of parliament, or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively."

State, 80 Ala. 511; *State v. Norris*, 9 N. H. 96; and see *Studdard v. Linville*, 8 Hawks. (N. C.) 474.

The opinions of witnesses (such as that of experts, and of jurists testifying as to foreign laws), if relevant and material, are proper subjects of perjury. *Patrick v. Smoke*, 8 Strobb. (S. C.) 147; *Fergus v. Hoard*, 15 Ill. 357; *State v. Lea*, 8 Ala. 602; *State v. Cruikshank*, 6 Blackf. (Ind.) 62; see *Hoch v. People*, 3 Mich. 552; *Com. v. Thompson*, 8 Dana (Ky.), 801. But an indictment for perjury cannot be maintained when the supposed perjury depends upon the construction of an instrument in writing. *State v. Woolverton*, 8 Blackf. (Ind.) 452.

It is no perjury for a defendant to deny having used the words "value received," in a promissory note, such words not being material. *People v. McDermott*, 8 Cal. 288. But, where there are certain interlineations in a written instrument, shown to have been made by one or the other of two persons, and one of the two falsely testifies that he did not make them, he commits perjury. *Smith v. Deaver*, 6 Jones (N. C.), 568.

Testimony tending to affect the verdict of the jury, or extenuating or increasing the damages or punishment, and thus influencing the judgment of the court, is material. *State v. Norris*, 9 N. H. 96; *Stephens v. The State*, 1 Swan. (Tenn.) 157.

Testimony as false and corrupt. To constitute perjury, the testimony must be false and corrupt. If the false oath is taken from inadvertence or mistake, it cannot amount to voluntary and corrupt perjury. *Steinman v. McWilliams*, 6 Barr (Penn.), 170; *United States v. Passmore*, 4 Dall. 878; *Jesse v. State*, 20 Ga. 156; *Green v. State*, 41 Ala. 419. But it is perjury where one swears willfully, absolutely, and falsely, to a matter which he believes, if he has no probable ground for such belief. *Com. v. Cook*, 1 Rob. (Va.) 729; *Com. v. Cornish*, 6 Binney (Penn.), 249. Or, if he swears to a particular fact, without knowing at the time whether it is true or false. *State v. Gates*, 17 N. H. 878; *Com. v. Halstat*, 2 Boston Law Rep. 177. So, if a witness supposes he is testifying falsely, it is perjury, though in fact his testimony is true. See *People v. McKinney*, 3 Park. 510; *State v. Cruikshank*, 6 Blackf. (Ind.) 62; 2 Bish. Cr. Law, § 1048. And if a witness testifies to two opposite things which are irreconcilable, perjury is committed in making the false statement, but not in making the true one. *Martin v. Miller*, 4 Mo. 47; see *Dodge v. State*, 4 Zab. (N. J.) 455; *People v. Burden*, 9 Barb. 467; *United States v. Wood*, 14 Pet. 490.

An honest oath taken under advice of counsel is not perjury. *U. S. v. Stanley*, 6 McLean, 409; *Hood v. State*, 44 Ala. 81; see *U. S. v. Conner*, 3 id. 578; *U. S. v. Dickey*, 1 Morris, 412. And where the witness truly states the facts to the writer of an affidavit, and swears to it when drawn up, he is not guilty of perjury, though the statements are written erroneously by the amanuensis. *Jesse v. State*, 20 Ga. 156. So, it may be stated generally, that false swearing to a fact, to the best of the opinion of the witness, which he, though without any reasonable cause, believes to be true, is not perjury. *Com. v. Brady*, 5 Gray (Mass.), 78. See *United States v. Shellmire*, Bald. 370; *U. S. v. Atkins*, 1 Sprague, 558; *Cothran v. State*, 39 Miss. 541.

Unnecessary oaths having been thus abolished in very many cases, it has, by the statute 14 & 15 Vict. c. 99, s. 16, been enacted that "every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having, by law or by consent of parties, authority to hear, receive, and examine evidence," may administer an oath to any witness legally called before him.

[* 155] And although, in virtue of various statutes (*v*), the necessity * of taking a formal oath may sometimes be dispensed with, the penalties of perjury will attach to any person making a wilfully false affirmation or declaration, in lieu of an oath, under statutory authority.

In order that an indictment for the offence under consideration may be maintainable, it must appear that the alleged perjury was corrupt (that is, committed *malo animo*), wilful, positive, and absolute (*x*); not upon surprise, or the like: it must also have been in a point material to the question in dispute (*y*); for if it were only in some trifling collateral circumstance, it is no more penal than in the voluntary extrajudicial oaths already mentioned.

Subornation of perjury is the offence of procuring another to take a false oath, as would constitute perjury in the principal (*z*). (665)

[* 156] * The statute 14 & 15 Vict. c. 100, s. 19, amending and extending the provisions of the 23 Geo. 3, c. 11, and 31 Geo. 3, c. 3, enacts, that it shall be lawful for a superior court of common law or equity, or any judge thereof, or for any justice, or commissioner of assizes, nisi prius, oyer and terminer, or gaol delivery, or for any justice of the peace, recorder or deputy recorder, chairman, or other judge, holding any general or quarter sessions of the peace, or for any commissioner of bankruptcy, or for any judge or deputy judge of any county court or any court of record, or for any justice of the peace

(*v*) As to persons objecting on account of religious scruples to be sworn, see the following statutes: 9 Geo. 4, c. 82, s. 1; 3 & 4 Will. 4, cc. 49 and 82; 5 & 6 Will. 4, c. 62; 1 & 2 Vict. c. 77; also 1 & 2 Vict. c. 105, whereby every person is bound by the oath taken by him in any proceeding, civil or criminal, if taken in such form as he may declare to be binding; and may, in case of wilful false swearing, be convicted of perjury in the same manner as if the oath had been administered in the form and with the ceremonies commonly adopted; 17 & 18 Vict. c. 125, ss. 20, 21, and 24 & 25 Vict. c. 66, ss. 1, 2, by which persons refusing from conscientious motives to be sworn in civil and in criminal proceedings respectively are permitted to make a solemn affirmation or declaration in lieu of the ordinary oath. 32 & 33 Vict. c. 68, s. 4.

(*x*) If a man swears that he believes that to be true which he knows to be false, he swears as absolutely, and is as criminal, in point of law, as if he had made a positive

assertion that the fact was as he swore he believed it to be. *Miller's Case*, 3 Wils. 427; Hawk. P. C., b. 1, c. 69, s. 7, n. (a). False swearing, however, as to the legal operation of a deed is not indictable. *R. v. Crespiigny*, 1 Esp. 280.

(*y*) If the subject-matter is entirely foreign to the purpose, not tending either to extenuate or increase the damages or the guilt, nor likely to induce the jury to give a more easy credit to the substantial part of the evidence, the party will not be liable to an indictment. Hawk. P. C. b. 1, c. 69, s. 8.

(*z*) To render the offence of subornation of perjury complete, either at common law or on the statute, the false oath must be actually taken, and no abortive attempt to solicit will bring the offender within its penalties. *R. v. Hinton*, 8 Mod. 122. But the criminal solicitation to commit perjury, though unsuccessful, is a misdemeanor at common law. 1 Hawk. P. C. c. 19, s. 10.

In most of the States of the Union there are statutes relating to the subject of perjury, and in some of the States the statutes make the offense felony. See *DeBernie v. The State*, 19 Ala. 23; *A. v. B.*, R. M. Charl. (Ga.) 228.

(665) See *Com. v. Smith*, 11 Allen (Mass.), 243, 256; *U. S. v. Staats*, 8 How. (U. S.) 41. In this offense the same rules as to materiality of testimony prevail as in perjury. *Com. v. Smith*, 11 Allen (Mass.), 243. And the offense of perjury must be actually committed by the person suborned, to render the suborner guilty. *Com. v. Douglass*, 5 Metc. (Mass.) 241; *Stewart v. State*, 22 Ohio St. 477.

in special or petty sessions, or for any sheriff or his lawful deputy before whom any writ of inquiry or writ of trial from any of the superior courts shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other proceeding made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to be a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted until the next session of oyer and terminer or gaol delivery for the county or other district within which such perjury was committed, unless he shall enter into a recognisance to appear and take his trial according to the requirements of the act.

The punishment of perjury and subornation, at common law, has been various. It was anciently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment, at the discretion of the court. The statutes below cited (a) have further empowered the court to award penal servitude for such offence.

* XVIII. Other offences which may here be specified are the endeavouring to dissuade a witness from giving evidence; the disclosing an [* 157]

XVIII. Dissuading witnesses from giving evidence, &c. examination before the privy council; the advising a prisoner to stand mute, all of which are impediments of justice, are high misprisions, and contempts of the queen's courts, and punishable by fine and imprisonment (b). (666) Anciently it was held, that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made accessory to the offence, if felony: and in treason a principal. And at this day it is agreed, that he is guilty of a high misprision (c), and is liable to be fined and imprisoned (d). (667)

(a) 2 Geo. 2, c. 25; 20 & 21 Vict. c. 8; 27 & 28 Vict. c. 47; *et vide* 5 Eliz. c. 9; 29 Eliz. c. 5, s. 2, and 21 Jac. 1, c. 28, s. 8; as to which, consult 26 & 27 Vict. c. 125.

(b) The mere attempt to stifle evidence is criminal, though the persuasion should not succeed, on the principle now fully established, that an incitement to commit any

crime is itself criminal. *R. v. Higgins*, 2 East, 5; *R. v. Lawley*, 2 Stra. 904. As to conspiring to prevent a witness from giving evidence, see *R. v. Stevenon*, 2 East, 862.

(c) See Bar. 212; 27 Ass. pl. 44, s. 4, fol. 188.

(d) 1 Hawk. P. C. 59.

The uncorroborated testimony of a perjured party is not sufficient to secure the conviction of the alleged suborner. *People v. Evans*, 40 N. Y. (1 Hand) 1; see *Warren v. Haight*, 62 Barb. 490.

In some of the States subornation of perjury is, by statute, made a separate offense. See *Com. v. Smith*, 11 Allen (Mass.), 243.

(666) The attempt to induce a witness to give false testimony, though unsuccessful, is an indictable offense. See 2 Bish. Crim. Law, § 1056. So, it is an indictable offense to dissuade a witness from attending the trial of a cause (*State v. Carpenter*, 20 Vt. 9; *State v. Keys*, 8 id. 57); or to spirit away a witness. See *State v. Early*, 3 Harr. (Del.) 562.

(667) But a witness may now be indicted for perjury for swearing falsely before a grand jury (*People v. Young*, 81 Cal. 514; *State v. Fassett*, 16 Conn. 457; *Thomas v. Com.*, 2 Rob. [Va.] 795); and the grand jurors are not only competent but compellable to give evidence of what was sworn to before them. *State v. Broughton*, 7 Ired. (N. C.) 96; *Perkins v. State*, 4 Ind. 222; *Com. v. Hill*, 11 Cush. (Mass.) 187; *Com. v. Mead*, 12 Gray (Mass.), 167; *Hindokoper v. Cotton*, 3 Watts (Penn.), 56. But see *Imlay v. Rogers*, 2 Halst. (N. J.) 847; *State v. Baker*, 20 Mo. 398.

XIX. Bribery is a species of offence which may be levelled against public justice; as when a judge, or other person concerned in its administration,

takes a reward to influence his behaviour in his office (*e*). (668)

XIX. Bribery.

In the East it is the custom never to petition any superior for justice, not excepting their kings, without a present. This may be calculated for the genius of despotic countries; where the true principles of government are never understood, and it is imagined there is no obligation from the superior to the inferior, no relative duty owing from the governor to the governed.

[*158] The Roman law, though * it contained many severe injunctions against bribery, as well for selling a man's vote in the senate or other public assembly, as for the bartering of common justice, yet, by a strange indulgence in one instance, tacitly encouraged this practice; allowing the magistrate to receive small presents, provided they did not in the whole exceed a hundred crowns in the year (*f*): not considering the insinuating nature and gigantic progress of this vice, when once admitted. Plato therefore more wisely, in his ideal republic (*g*), orders those who take presents for doing their duty to be punished in the severest manner: and by the laws of Athens he who offered was prosecuted, as well as he who received a bribe (*h*). In England this offence of taking bribes is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, the same (*i*). But in judges, especially the superior ones, it has been always looked upon as a heinous offence, and by a statute of 11 Hen. IV., it was enacted that all judges and officers of the king, convicted of bribery, should forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service for ever (*k*). And some notable examples have been made in parliament, of persons in the highest stations, and otherwise very eminent and able, who were contaminated with this sordid vice (*l*).

XX. Embracery is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like (*m*).

(*e*) 1 Hawk. P. C. 168. It is equally a crime to give as to receive a bribe, and in many cases the attempt itself is an offence complete on the side of him who offers it. Thus an attempt to bribe a privy councillor to procure a reversionary patent of an office, grantable by the crown under the great seal, is indictable though it did not succeed. *R. v. Vaughan*, 4 Burr. 2491; cited in *R. v. Pollman*, 2 Campb. 220.

(*f*) Dig. 48, 11, 6.

(*g*) De Leg. l. 12.

(*h*) Pott. Antiq. b. 1, c. 23.

(*i*) 8 Inst. 147.

(*k*) *Ibid.*, 146. The statutes of 11 Hen. 4, are repealed by 26 & 27 Vict. c. 125.

(*l*) See the proceedings against Lord Bacon, 2 St. Tr. 1067, and against Lord Macclesfield, 16 Id. 767.

(*m*) 1 Hawk. P. C. 269.

(668) Bribery is the voluntary giving or receiving of any thing of value in corrupt payment for an official act, done or to be done. 2 Bish. Crim. Law, § 85. And see *Dishon v. Smith*, 10 Iowa, 212. The offence is complete when an offer is made, although in a matter not within the jurisdiction of the officer. *Id.*; *State v. Ellis*, 33 N. J. (4 Vroom) 102.

Judges, justices of the peace, and all ministerial officers are indictable for accepting or offering to accept any money or other benefit having a tendency to influence their official conduct. *Com. v. Callaghan*, 2 Va. Cas. 460; *Com. v. Chapman*, 1 id. 138; *Barefield v. State*, 14 Ala. 508. So it is an indictable offence to pay money to a voter to vote at an election for a particular candidate. *Com. v. Shaver*, 3 Watts & S. (Penn.) 388.

Even the attempt to bribe is indictable (*Com. v. Harris*, 1 Leg. Gas. Rep. [Penn.] 455); and where an offer is made by letter through the post-office, the writer commits a complete offence at the place he deposits the letter. *United States v. Worrall*, 2 Dall. 394.

XX. Embracery. By the 6 Geo. 4, c. 50, s. 61, the offence of embracery of jurors, and of jurors wilfully and corruptly consenting thereto, is punishable by fine and imprisonment. (669)

* **XXI.** Contempts against the royal palaces or against courts of justice, have always been looked upon as high misprisions; by the [* 159]

XXI. Contempts against courts of justice. ancient law, before the conquest, fighting in the king's palace, or before the king's judges, was punished with death (*n*): and by the 25 Edw. 3, st. 5, c. 2, slaying the chancellor or a justice of either bench sitting in the discharge of his judicial duty was constituted treason (*o*). So too, according to the old Gothic constitutions, there were many places privileged by law, *quibus major reverentia et securitas debetur, ut templa et judicia, quæ sancta habebantur,—arces et aula regis,—denique locus quilibet præsentem aut adventantem rege* (*p*). And, with us, by the statute 33 Hen. 8, c. 12, malicious striking in the king's palace, wherein his royal person resided, whereby blood was drawn, was punishable by perpetual imprisonment, and fine at the king's pleasure; and also with loss of the offender's right hand, the solemn execution of which sentence is prescribed in the statute at length (*q*).

Striking in the superior courts of justice, in Westminster-hall, or at the assizes, was still more penal than even in the king's palace. The reason seems

Actual violence. to be, that these courts being anciently held in the king's palace, striking there included the former contempt against the king's palace, and something more; viz. the disturbance of public justice. For this reason, by the ancient common law before the conquest (*r*), striking in the king's courts of justice, or drawing a sword therein, was a capital *felony; and our modern law retains so much of the ancient severity [* 160] as only to exchange the loss of life for the loss of the offending limb.

Therefore a stroke or blow in such a court of justice, whether blood be drawn or not, or even assaulting a judge sitting in the court, by drawing a weapon, without any blow struck, is in strictness punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of the offender's lands during life (*s*). A rescue also of a prisoner from any of the said courts, without striking a blow, is punishable with perpetual imprisonment, and forfeiture of goods, and of the profits of lands during life (*t*): being looked upon as an offence of the same nature with the last; but only, as no blow is actually given, the amputation of the hand is excused. For

(*n*) 8 Inst. 140. Leg. Alfred. cap. 7; Leg. Canuti, cap. 60.

(*o*) See also 7 Ann. c. 21; 1 Hale, P. C. 281.

(*p*) Stiernh. de Jure Goth. l. 3, c. 8.

(*q*) See the trial of Sir Edmond Knevet, who was prosecuted soon after the above statute had been enacted, though whether under its provisions seems doubtful. After pleading guilty the accused was pardoned. 1 St. Tr. 443.

The 33 Hen. 8, c. 12, was repealed by the 9 Geo. 4, c. 81, so far as regards ss. 6—18, which prescribed the punishment for the above offence.

(*r*) Leg. Inæ. c. 6; Leg. Canut. c. 65; Leg. Alfred. c. 7.

(*s*) Staund. P. C. 38; 8 Inst. 140, 141.

(*t*) 1 Hawk. P. C. 57.

(669) To approach jurymen for the purpose of intimidating or influencing them is, at common law, an indictable offence. See *Com. v. Simons*, 6 Phila. (Penn.) 187; *McCullough v. Com.*, 67 Penn. St. 30; *Com. v. Craus*, 3 Penn. Law Jour. 459. See *State v. Sales*, 3 Nev. 268.

In the federal courts the offence has, by a statute of the United States, a specific penalty. See 2 Whart. Crim. Law, § 8447.

the like reason, an affray, or riot, near the said courts, but out of their actual view, is punishable only with fine and imprisonment (*u*).

Not only such as are guilty of an actual violence, but those also who use threatening or reproachful words to any judge sitting in court, are guilty of a high misprision, and have been punished with large fines, imprisonment and [* 161] corporal punishment (*x*). And, even * in inferior courts, an affray or contemptuous behaviour is punishable with a fine by the judge there sitting; as by the steward in a court-leet, or the like (*y*). A libel upon the administration of justice, moreover, is clearly indictable (*z*).

Likewise all such, as are guilty of any injurious treatment to those who are immediately under the protection of a court of justice, are punishable by fine and imprisonment: as if a man assaults or threatens his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody, and properly executing his duty (*a*): which offences, when they proceeded farther than bare threats, were punished in the Gothic constitutions with exile and forfeiture of goods (*b*). (670)

(*u*) *Waller's Case*, Cro. Car. 373.

Lord Thanet and others were prosecuted by an information filed by the attorney-general for a riot at the trial of Arthur O'Connor and others for high treason under a special commission at Maidstone. Two of the defendants were found guilty generally. The three first counts charged (*inter alia*) that the defendants did riotously make an assault on one J. R., and did then and there beat, bruise, wound, and ill-treat the said J. R. in the presence of the commissioners. When the defendants were brought up for judgment, Lord Kenyon expressed doubts, whether upon this information the court was not bound to

pronounce the judgment of amputation of the right hand, &c. as required in a prosecution expressly for striking in a court of justice. In consequence of these doubts, the attorney-general entered a *nolle prosequi* upon the first three counts, and the court pronounced judgment of fine and imprisonment as for a common riot. 27 St. Tr. 831. 1 East, P. C. 438.

(*x*) *Harrison's Case*, Cro. Car. 503.

(*y*) 1 Hawk. P. C. 58.

(*z*) *R. v. Johnson*, 29 St. Tr. 81.

(*a*) 8 Inst. 141, 142.

(*b*) Stiernh. de Jure Goth. l. 3, c. 3.

(670) The power to punish for a contempt is inherent in all courts of record (*Batchelder v. Moore*, 42 Cal. 412; *Morrison v. McDonald*, 21 Me. 550; *Stuart v. People*, 3 Scam. [Ill.] 395; *Watson v. Williams*, 36 Miss. 331; *State v. Matthews*, 37 N. H. 450; *Ex parte Smith*, 28 Ind. 47; *In re Moore*, 63 N. C. 397; *Yates v. Lansing*, 9 Johns. 385); and the authority is held to extend to justices of the peace acting judicially. *State v. Applegate*, 2 McCord (S. C.), 110; *State v. Copp*, 15 N. H. 212; *Lining v. Bentham*, 2 Bay (S. C.), 1; *State v. Johnson*, id. 385; *In re Cooper*, 32 Vt. 253. But see *Brooker v. Com.*, 12 Serg. & R. (Penn.) 175; *Fidler v. Probasco*, 2 Browne (Penn.), 137; *Richmond v. Dayton*, 10 Johns. 398; *People v. Webster*, 3 Park. 503.

The power to punish contempts also extends to the Senate and House of Representatives of the United States (*Anderson v. Dunn*, 6 Wheat. 204); and to the corresponding legislative bodies of the respective States. *State v. Matthews*, 37 N. H. 450; *Burnham v. Morrissey* 14 Gray (Mass.), 226; *Fulvey v. Massing*, 7 Wis. 630. See a most interesting case of this kind, in which a justice of the Supreme Court of the State of New York was summoned before the legislature for an alleged contempt, and in which the judge vindicated the rights of the judiciary in an able, learned and dignified manner. *In re Potter*, 55 Barb. 625.

A contempt is *direct* when committed before and in the presence of, or so near to the court as to interrupt the proceedings; and such contempts are summarily punished in a summary manner, without evidence, but upon the view and personal knowledge of the presiding judge. *Stewart v. People*, 3 Scam. (Ill.) 395; *Whittem v. The State*, 36 Ind. 196. Thus, any disrespectful or insolent behavior toward the presiding judge; any breach of order, decency, or decorum by persons present; or any assault made in view of the court, may be punished summarily. See *St. Clair v. Platt*, Wright (Ohio), 532; *People v. Turner*, 1 Cal. 152; *Ex parte Summers*, 5 Ired. (N. C.) 149. For further illustrations see *State v.*

XXII. Another offence to be here noticed is the negligence of a public officer, intrusted with the administration of justice, as a sheriff, coroner, constable, and the like, which makes the offender liable to be fined; and may entail a forfeiture of his office, if it be a beneficial one (c). (671)

(c) 1 Hawk. P. C. 168. As to the liabilities of magistrates, of coroners, and other officials for misconduct, *ante*, vol. i.

Coulter, Wright (Ohio), 421; *State v. Goff*, id. 78; *Blight v. Fisher*, Peters' C. C. 41; *Lott v. Burrell*, 2 Mill (S. C.), 167; *Stansbury v. Marks*, 2 Dall. 218; 12 Albany Law Jour. 218-216.

Contempts are *constructive* when they are committed not in presence of the court, and when they tend, by their open action, to interrupt, obstruct, embarrass, or prevent the due administration of justice. *Whittem v. State*, 36 Ind. 196. As illustrations of this class of contempts may be mentioned the refusal of a witness to obey the process of the court (*Com. v. Deskins*, 4 Leigh [Va.], 689; *State v. Trumbull*, 1 South. [N. J.] 139; *Delaney v. Regulators*, 1 Yeates [Penn.], 408); refusal by sheriffs and like officers to serve or return process (*State v. Williams*, 2 Speers [S. C.], 26; *People v. Marsh*, 2 Cow. 493; *Ex parte Summers*, 5 Ired. [N. C.] 149; *Rice v. McClintock*, Dudley [S. C.], 354); or to pay money collected (*Conner v. Archer*, 1 Speers [S. C.], 89; *Matter of Stephens*, 1 Kelley [Ga.], 584); or an abuse in serving a precept (*State v. Tipton*, 1 Blackf. [Ind.] 166); or the making of a false return. So, it is a contempt of this kind to disobey an injunction (*Davis v. Mayor of N. Y.*, 1 Duer, 451; *People v. Compton*, id. 512; *Gates v. McDaniel*, 3 Port. [Ala.] 356); or a decree to make a conveyance (*Buffum's Case*, 13 N. H. 14); or an order to perform the award of referees (*Yates v. Russell*, 17 Johns. 461; *Shriver v. State*, 9 Gill & J. [Md.] 1); or other similar command. *Sherman v. Cohen*, 2 Strobb. (S. C.) 553; *Livingston v. Fitzgerald*, 2 Barb. 396; *Ex parte Langdon*, 25 Vt. 680; *Ex parte Walker*, 25 Ala. 81; *Philips v. Harris*, J. J. Marsh. (Ky.) 122. And see other illustrations in *Whittem v. The State*, 36 Ind. 196, 218.

In cases of constructive contempt a rule to show cause is necessary, and affidavits must be presented, or information presented by the proper officer, to prove the facts. See *Hollingsworth v. Duane*, Wall. C. C. 141; *Whittem v. State*, 36 Ind. 196, 218; 3 Whart. Crim. Law, § 3449.

The court against whom the contempt is committed, alone has power to proceed against it. See *Jordan v. State*, 14 Texas, 436; *In re Cooper*, 32 Vt. 253; *Ex parte Adams*, 25 Miss. 883; *Yates v. Lansing*, 9 Johns. 395; *State v. Mott*, 4 Jones (N. C.), 449. And the punishment is usually fine or imprisonment, or both, at the discretion of the judge. See *People v. Bennet*, 4 Paige, 282. In case of attorneys, the court has power to strike their names from the roll, or suspend them for a fixed period. *State v. Williams*, 2 Speers (S. C.), 26; see *Com. v. Barry*, Hardin (Ky.), 229; *People v. Turner*, 1 Cal. 188. See, as to contempt of witness, *U. S. v. Caton*, 1 Cranch, 150. And in respect to perjury, see *Wells v. Com.*, 21 Gratt. 500; *Brinkley v. Brinkley*, 47 N. Y. (2 Sick.) 40. As it regards appeals by statute in proceedings for contempt, see id.; *Whittem v. State*, 36 Ind. 196; *Erie Railway Co. v. Ramsey*, 45 N. Y. (6 Hand) 637; *Sudlow v. Knox*, 7 Abb. N. S. 411. Many acts are at the same time both contempts of court and indictable crimes; but the indictment and the proceeding for contempt are wholly distinct, and neither will bar or impede the other. *State v. Williams*, 2 Speers (S. C.), 26; *State v. Woodfin*, 5 Ired. (N. C.) 199; *State v. Yancey*, 1 Car. Law Repos. 519; *Foster v. Com.*, 8 Watts & S. (Penn.) 77; *Vertner v. Martin*, 10 Smed. & M. (Miss.) 103. A person brought in on process of contempt has the privilege of purging his contempt. And a declaration under oath, that nothing improper was intended, and that the party acted in good faith, is in many instances sufficient (*People v. Few*, 2 Johns. 290; *St. Clair v. Piatt*, Wright [Ohio], 532; *State v. Coulter*, id. 421; *State v. Goff*, id. 78); but not where a private right is to be enforced. *Buffum's Case*, 13 N. H. 14; *People v. Compton*, 1 Duer, 512; and see *People v. Freer*, 1 Caines, 485; *U. S. v. Coolidge*, 2 Gall. 364.

(671) A sheriff cannot be held criminally liable for the conduct of his deputy. *Overholzer v. McMichael*, 10 Barr (Penn.), 139; *Com. v. Lewis*, 4 Leigh (Va.), 664; *State v. Berkshire*, 2 Ind. 207.

XXIII. There is yet another offence against public justice, of deep malignity; and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of an offender may often deter the injured from a legal prosecution. This is the oppression and tyrannical partiality of a judge, justice, or other magistrate, in the administration and under the colour of his office. However, when prosecuted, either by [* 162] impeachment in parliament, or by information in the court * of Queen's Bench (according to the rank of the offender) this misconduct is sure to be severely punished with forfeiture of office (either consequential or immediate), fine, imprisonment, or other discretionary censure, regulated by the nature and aggravations of the offence committed.

XXIV. Lastly, extortion is an abuse of public justice, which consists in an officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due (d). The punishment for this offence is fine and imprisonment, and sometimes a forfeiture of office (e). (672)

(d) 1 Hawk. P. C. 170.

(e) By 8 Edw. 1, c. 26, the defendant shall be punished at the king's pleasure, i.e., at the discretion of the justices who are to pronounce the sentence. 2 Inst. 210.

(672) This offense may be committed by sheriffs and their deputies. *Com. v. Bayley*, 7 Pick. (Mass.) 279; constables, *State v. Merritt*, 5 Sneed (Tenn.), 67; clerks of courts, see *Com. v. Rodes*, 6 B. Monr. (Ky.) 171; justices of the peace, *People v. Whaley*, 6 Cow. 661; county treasurers, *State v. Burton*, 3 Ind. 93, or generally by any person holding office.

But to constitute the offense, the thing extorted must be procured by the officer under color of his office. See *Runnells v. Fletcher*, 15 Mass. 525; *Evans v. Trenton*, 4 Zab. (N. J.) 764. And the act must proceed from a corrupt motive. *People v. Whaley*, 6 Cow. 661; *Com. v. Shed*, 1 Mass. 228; *Lincoln v. Shaw*, 17 id. 410; *People v. Coon*, 15 Wend. 277; *State v. Statts*, 5 Blackf. (Ind.) 460. It is enough if any thing valuable is received (id.); but a mere agreement to pay will not sustain a charge of extortion. *Com. v. Cony*, 2 Mass. 523; *Com. v. Pease*, 16 id. 91.

The summary penalties attached to the offense of extortion, by statute in the various States, have not generally abrogated the common-law remedy. See *Com. v. Bagley*, 7 Pick. (Mass.) 279; *Shattuck v. Woods*, 1 id. 171. As to Pennsylvania, see *Com. v. Evans*, 13 Serg & R. 426; Illinois, *Hankey v. People*, 1 Scam. (Ill.) 80.

There may be an extortion from a county or other corporation, as well as from an individual. *State v. Moore*, 1 Ind. 548.

* CHAPTER X.

[*163]

OFFENCES AGAINST THE PUBLIC PEACE.

WE are next to consider offences against the public peace; the conservation of which is intrusted to the sovereign and the executive, in the manner and for the reasons which were formerly mentioned (a). An offence falling within the limits of this chapter is either an actual breach of the peace, or constructively so, by tending to make others break it. It is either felonious, or not felonious. The felonious breaches of the peace are strained up to that degree of malignity by the statute law: and particularly,

I. The riotous assembling of twelve persons, or more, and not dispersing upon proclamation. This was first made high treason by statute 3 & 4 Edw. 6, c. 5, when the king was a minor, and a change in religion to be effected: but that statute was repealed by statute 1 Mar. c. 1, among the other treasons created since the 25 Edw. 3: though the prohibition was in substance re-enacted, with an inferior degree of punishment, by statute 1 Mar. st. 2, c. 12, which made the same offence a felony. These statutes specified and particularized the nature of the riots they were meant to suppress; as, for example, such as were set on foot with intention to offer violence to the privy council, or to change the laws of the kingdom, or for certain other specific purposes: in which cases, if * the persons implicated were [*164] commanded by proclamation to disperse, and did not, it was by the statute of Mary made felony, but within the benefit of clergy; and also the act indemnified the police officers and their assistants, if they killed any of the mob in endeavouring to suppress such riot. This was thought a necessary security in that sanguinary reign, when popery was intended to be re-established, which was likely to produce great discontents: but at first it was made only for a year, and was afterwards continued for that queen's life. And, by statute 1 Eliz. c. 16, when a reformation in religion was to be once more attempted, it was revived and continued during her life also; and then expired. From the accession of James I. to the death of queen Anne, it was never thought expedient to revive it: but, in the first year of George I., it was judged necessary, in order to support the execution of the act of settlement, to renew it, and at one stroke to make it perpetual, with large additions. For, whereas the former acts expressly defined and specified what should be accounted a riot, the statute 1 Geo. 1, st. 2, c. 5, enacts, generally (s. 1), that if any twelve persons are unlawfully assembled to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff, or mayor of a town, shall think proper to command them by proclamation to disperse, if they contempt his orders and continue together for one hour afterwards, such contempt shall be felony. And, further, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers are felons without benefit of clergy: and all persons to whom such proclamation ought to have been made, and knowing

(a) Vol. i. chaps. 6, 7.

of such hindrance, and not dispersing, are felons (*b*). There is the like [**165*] *indemnifying clause, in case any of the mob be unfortunately killed in the endeavour to disperse them; being copied from the act of queen Mary (*c*).

II. Besides the Riot Act, various enactments have been made with a view to checking the destruction of property by rioters and others:

By statute 24 & 25 Vict. c. 97 (*d*), if "any persons riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force demolish, or pull down or destroy, or begin to demolish, pull down or destroy," any church, meeting-house, or other place of divine worship, or any house, outhouse, office, shop, mill, malthouse, or any building used in farming land, or in carrying on any trade or manufacture, or any building other than such as before-mentioned, belonging to any county, city, borough, poor law union, parish, or place, or to any university, college, or inn of court, or any machinery or mining engine, every such offender shall be guilty of felony (*e*): or if the jury find that the accused was guilty only of injuring or damaging any such building or thing as aforesaid, of a misdemeanor (*f*)—punishable, in either case, as undermentioned.

Each of the following offences, analogous to the preceding and involving a breach of the public peace, has also been constituted a statutory felony:—

[**166*] *The unlawfully and maliciously setting fire to any church, meeting-house, or other place of divine worship, or to any county, civic, parochial, or collegiate building (*g*).

The breaking and entering any such place of worship as aforesaid, and committing a felony therein, and breaking out of the same (*h*), or breaking and entering such place of worship with intent to commit a felony therein (*i*).

The unlawfully and maliciously damaging or destroying any sea, river, or canal bank, whereby any land or building shall be or shall be in danger of being overflowed, and the unlawfully and maliciously destroying any quay, wharf, floodgate, or other work belonging to any port, harbour, dock, or reser-

(*b*) The punishment of death is taken away, by the 1 Vict. c. 91, s. 1, from these offences; they are now subjected to penal servitude for life, or for any term not less than five years,—or imprisonment for any term not exceeding three years.

(*c*) The duties of magistrates and others during a time of riotous disturbance, are set forth in *Reg. v. Pinney*, 2 Townsend, St. Tr. 273; 5 Car. & P. 254.

(*d*) Sect. 11.

(*e*) Punishment: penal servitude for life, or for not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(*f*) Sect. 12. Punishment: penal servitude for not more than seven nor less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour. As to the remedies of the injured

parties in these cases against the hundred, see stat. 7 & 8 Geo. 4, c. 81, ss. 2, 3, cited *ante*, vol. iii.

(*g*) 24 & 25 Vict. c. 97, ss. 1, 5. Punishment: penal servitude for life or for not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping. See also ss. 7, 8.

(*h*) 24 & 25 Vict. c. 96, s. 50. Punishment: penal servitude for life, or for not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(*i*) 24 & 25 Vict. c. 96, s. 57. Punishment: penal servitude for not more than seven nor less than five years, or imprisonment as in the preceding note.

voir, or to any navigable river or canal (*k*), and the so destroying any bridge, viaduct or aqueduct (*l*).

III. The following persons also are by various recent enactments declared to be guilty of felony:—

1. Whosoever “shall maliciously send, deliver, or utter
III. Sending threatening letters, or using menaces, &c. * or directly or indirectly cause to be received, know- [*167]
 ing the contents thereof, any letter or writing,” threatening to kill or murder any person (*m*), threatening to burn or destroy any house, or other building, or any stack of agricultural produce, or any such produce in any building, or any ship or vessel, or to kill, maim, or wound any cattle (*n*), or demanding of any person with menaces, and without any reasonable or probable cause, any property, money, or valuable thing (*o*), or accusing or threatening to accuse any person of any crime punishable by law with death or penal servitude for not less than seven years, or of any assault with intent to commit rape, or of any attempt or endeavour to commit it, or of any infamous crime (*p*), with a view to extort by means of such letter or writing any property, money, or valuable thing from any person (*q*).

2. Whosoever shall with menaces or by force demand any property, money, or valuable thing of any person, with intent to steal the same (*r*), or shall accuse or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any * of the infamous or [*168] other crimes before-mentioned, with the view to extort from such person so accused or threatened to be accused, or from any other person, any property, money, or valuable thing (*s*), or with intent to defraud or injure any other person, shall, by any unlawful violence to or restraint of, or threat of violence to or restraint of, the person of another, or by accusing or threatening to accuse any person of any treason, felony, or infamous crime (*t*), compel or induce any person to execute, make, accept, indorse, alter, or destroy

(*k*) 24 & 25 Vict. c. 97, s. 30. Punishment: penal servitude for life or for not less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping. See also, ss. 31, 32.

(*l*) 24 & 25 Vict. c. 97, s. 33. Punishment: as in n. (*k*), *supra*. The unlawfully and maliciously destroying any turnpike-gate or toll-bar (*s*. 34), or any work of art (*s*. 39), is constituted a misdemeanor. See also, s. 52.

(*m*) 24 & 25 Vict. c. 100, s. 16. Punishment: penal servitude for not more than ten nor less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*n*) 24 & 25 Vict. c. 97, s. 50. Punishment: same as in preceding note.

(*o*) 24 & 25 Vict. c. 96, s. 44. Punishment: penal servitude for life or for not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary

confinement, and, if a male under the age of sixteen years, with or without whipping.

(*p*) The crime against nature, and every assault with intent to commit the said crime, and every attempt or endeavour to commit it, and every solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to commit or permit it, is to be deemed an infamous crime within the meaning of the above enactment, 24 & 25 Vict. c. 96, s. 64.

(*q*) 24 & 25 Vict. c. 96, s. 46. Punishment: as above, n. (*o*).

(*r*) 24 & 25 Vict. c. 96, s. 45. Punishment: penal servitude for five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement. See *Reg. v. Walton*, L. & C. 288; *Reg. v. Robertson*, *ib.* 483.

(*s*) 24 & 25 Vict. c. 96, s. 47. Punishment: penal servitude for life, or for not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping. See *R. v. Redman*, 85 L. J. M. C. 89.

(*t*) *Supra*, n. (*p*).

the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or copartnership, or the seal of any body corporate, company, or society, upon or to any paper or parchment, in order that the same may be afterwards made or converted into, or used or dealt with as a valuable security (u).

It is immaterial whether the menaces or threats mentioned in the sections of the Larceny Act above cited be of violence, injury, or accusation to be caused or made by the offender or by any other person (x).

The following offences are misdemeanors:—

IV. An affray (from *affrayer*, to frighten) is the fighting of two or more persons in some public place, to the terror of her majesty's subjects: for, if the fighting be in private, it is no affray, but an assault (y). (673) An affray may be suppressed by any private person present, who is * justifiable in endeavouring to part the combatants, whatever consequence may ensue (z). But more especially the constable, or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over; and may then perhaps also make them find sureties for the peace (a). The punishment of a common affray is by fine and imprisonment: the measure of which must be regulated by the circumstances of the case: for, where there is any material aggravation, the punishment proportionably increases. As where the officers of justice are disturbed in the due execution of their office: or where a respect to the particular locality ought to restrain and regulate men's behaviour, more than in common places; as in the king's court, and the like. And upon the same account also affrays in a church or churchyard are esteemed very heinous offences, as being indignities to Him to whose service those places are consecrated. Therefore mere quarrelsome words, which are neither an affray nor an offence in any other place, are penal here. For it is enacted by 5 & 6 Edw. 6, c. 4, s. 1, that if any person shall, by words only, quarrel, chide, or brawl, in a church or churchyard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesiæ*; and, if a clerk in orders, from the ministration of his office during pleasure. Also, by section 2 of the same statute, if any person in such church or churchyard proceeds to smite or lay violent hands upon another, he shall be excommunicated *ipso facto*. This enactment,

(u) 24 & 25 Vict. c. 96, s. 48. Punishment: penal servitude for life, or for any term not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(x) 24 & 25 Vict. c. 96, s. 49.

(y) 1 Hawk. P. C. 134.

(z) 1 Hawk. P. C. 136.

(a) *Ibid.* 137.

(673) See *Sampson v. State*, 5 Yerg. (Tenn.) 356; *Duncan v. Com.*, 6 Dana (Ky.), 295. The fighting must be alleged in the indictment, and proved on the trial to have been in some public place. See *State v. Sumner*, 5 Strobl. (S. C.) 53; *State v. Heflin*, 8 Humph. (Tenn.) 84. Mere words will not constitute an affray. *Hawkins v. State*, 13 Ga. 322; *O'Neill v. State*, 16 Ala. 65; and it is held that the fighting must be by mutual consent. *Klum v. State*, 1 Blackf. (Ind.) 377; *Duncan v. Com.*, 6 Dana (Ky.), 295. But see *Cash v. State*, Overt. (Tenn.) 198.

He who aids, assists, and abets an affray is guilty as principal. *Hawkins v. State*, 13 Ga. 322.

however, "so far as it relates to persons not in orders," has been repealed by the 23 & 24 Vict. c. 32, s. 5 (*b*).

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* Two persons may be guilty of an affray: but,

V. Riots and unlawful assemblies. Riots, routs, and unlawful assemblies, must have three persons at least to constitute them. An unlawful assembly is when three or more do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren or the game therein; and part without doing it, or making any motion towards it (*c*). A rout is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common or of way; and make some advances towards it (*d*). A riot is where three or more do an unlawful act of violence, either with or without a common cause or quarrel (*e*): as if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent, tumultuous, and unjustifiable manner (*f*). (674) The punishment of unlawful assemblies, if to the number of twelve, we have just now seen, may extend to penal servitude (*g*), but from the number of three to eleven, is by fine and imprisonment, with or without hard labour (*h*). The same is the case in riots and routs by the common law (*i*). And by the statute 13 Hen. 4, c. 7, any two justices, together with the sheriff or under-sheriff of the county, may come with the *posse comitatus*, if need be, and suppress any such riot, assembly, or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction; which record alone shall be a sufficient conviction of the offenders. Under this statute it has been held that any battery, wounding, or killing of the rioters, which may * happen in suppressing the riot, is justifiable (*k*). So that our ancient law, previous to the modern Riot Act, [* 171] seems pretty well to have guarded against any violent breach of the public peace; especially as any riotous assembly on a public or general account, as to redress grievances or pull down all enclosures, and also resisting the queen's

(*b*) The 3rd sect. of the above-mentioned statute of Edw. 6, was repealed by the 9 Geo. 4, c. 31. (*f*) 2 Hawk. P. C. c. 65, ss. 2, 3, 7. See *Clifford v. Brandon*, 2 Camp. 358.

(*c*) 8 Inst. 176.

(*d*) Bro. Abr. tit. Riot, 4, 5.

(*e*) 8 Inst. 176.

(*g*) *Ante*, p. 164.

(*h*) 8 Geo. 4, c. 114.

(*i*) 1 Hawk. P. C. 159.

(*k*) 1 Hale, P. C. 495; 1 Hawk. P. C. 161.

(674) The concurrence of three or more persons is essential to the commission of a riot. *Com. v. Edwards*, 1 Ashm. (Penn.) 46; *State v. Alison*, 3 Yerg. (Tenn.) 428; *Turpin v. State*, 4 Blackf. (Ind.) 72. See *State v. Straw*, 83 Me. 554; *Scott v. United States*, 1 Morris, 149. And there must be an unlawful assembly. *State v. Stalcup*, 1 Ired. (N. C.) 90. But a lawful assembly can be rendered unlawful, by the concerted determination of the individuals; and the assembly may then amount to a riot. *State v. Snow*, 18 Me. 346; *State v. Cole*, 2 McCord (S. C.), 117.

The assembly must be such as to inspire people with terror. See *Douglass v. State*, 6 Yerg. (Tenn.) 525; *Penns v. Cribbs*, Add. (Penn.) 277; *State v. Brasil*, Rice (S. C.), 258; but it would seem to be enough if a single family or person be terrified. *State v. Alexander*, 7 Rich. (S. C.) 5; *State v. Jackson*, 1 Spear (S. C.), 18.

A mere coming together to commit a riot is indictable as an unlawful assembly. 2 Bish. Cr. Law, § 1151; 4 Penn. Law Jour. 81. A rout is an attempt at riot made by an unlawful assembly, and it requires, at least, three persons to commit the offense. See *State v. Sumner*, 2 Spear (S. C.), 599.

forces, if sent to keep the peace, may amount to overt acts of treason, by levying war against the sovereign.

VI. Nearly related to the foregoing head of riots is the offence of tumultuous petitioning; which was carried to an enormous height in the times preceding the grand rebellion. Wherefore, by statute 13 Car. 2, st. 1, c. 5, VI. Tumultuous petitioning. it is enacted, that not more than twenty names shall be signed to any petition to the crown or either house of parliament, for any alteration of matters established by law in church or state; unless the contents thereof be previously approved, in the country, by three justices, or the majority of the grand jury at the assizes or quarter-sessions; and, in London, by the lord mayor, aldermen, and common council (*l*), and that no petition shall be delivered by a company of more than ten persons; on pain in either case of incurring a penalty not exceeding 100*l*. and three months' imprisonment (*m*). Also by statute 57 Geo. 3, c. 19, s. 23, no meeting of more than fifty persons within the distance of one mile from Westminster Hall, for the purpose or on the pretext of petitioning the Crown or parliament, during the sitting of parliament, or of the courts at Westminster, is legal.

[*172] VII. A seventh offence against the public peace is that * of a forcible entry or detainer; which is committed by violently taking or keeping possession of lands and tenements, with menaces, force, and arms, VII. Forcible entry, &c. and without the authority of law. This was formerly allowable to every person disseised, or turned out of possession, unless his entry was taken away or barred by his own neglect, or in some special cases. But this being found prejudicial to the public peace, it was thought necessary by several statutes to restrain persons from the use of such violent methods, even of doing themselves justice; and much more if they have no justice in their claim (*n*). So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence and unusual weapons. A forcible entry and detainer is indictable at common law (*o*). By the statute 5 Ric. 2, st. 1, c. 8, all forcible entries are punished with imprisonment and ransom at the king's will (*p*). And by the several statutes, 15 Ric. 2, c. 2, 8 Hen. 6, c. 9, 31 Eliz. c. 11, and 21 Jac. 1, c. 15, upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more justices of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his or their own view, as in case of riots; and upon such conviction may commit the offender to gaol, till he makes fines and ransom to the crown. Moreover, the justice or justices have power to summon a jury to try the forcible entry or detainer complained of: and if the same be found by that jury, then, besides the fine on the offender, the justices shall make restitution by the sheriff of the possession, without inquiring into the merits of the title: for the force is the only thing to be tried, punished, and remedied by them: and

(*l*) This may be one reason why the corporation of London has, since the restoration, usually taken the lead in petitions to parliament for the alteration of any established law.

(*m*) The bill of rights does not virtually repeal this provision. *R. v. Lord George Gordon*, Dougl. 592.

(*n*) 1 Hawk. P. C. 141.

(*o*) *R. v. Wilson*, 8 T. R. 857. Per *Parke, B.*, *Harvey v. Brydges*, 14 M. & W. 442; *R. v. Smyth*, 5 C. & P. 201.

(*p*) And a small fine may be imposed. *R. v. Lloyd*, Cald. 416.

the same may be done by indictment at the general *sessions (q). [* 173] But this provision does not extend to such as endeavour to maintain possession by force, where they themselves, or their ancestors, have been in the peaceable enjoyment of the lands and tenements, for three years immediately preceding (r). (675)

VIII. Besides actual breaches of the peace, anything that tends to provoke or excite others to break it, is an offence. Therefore a challenge to fight, either by word or letter, or to be the bearer of such challenge, is punishable by fine and imprisonment, according to the circumstances of the offence (s). (676)

IX. A libel, *libellus famosus*, taken in its largest sense, signifies any writing, picture, or the like, of an immoral or legal tendency; but, in the sense under which we are now to consider it, is a malicious defamation of any person, made public by printing, writing, sign, or picture, in order to provoke him to wrath, or expose him to public hatred, contempt and ridicule (t). (677) The direct tendency of a libel is to induce a breach of the

(q) Where the indictment was framed on the stat. 8 Hen. 8, c. 9, and the judge at the assizes, in his discretion, refused to award restitution, the Court of Queen's Bench would not review his decision. *Reg. v. Harland*, 8 Ad. & E. 826.

(r) 8 Hen. 8, c. 9, s. 7.

(s) 1 Hawk. P. C. 135, 138; *R. v. Rice*, 3 East, 581. This is an offence, though the provocation to fight do not succeed, and it is

a misdemeanor merely to endeavor to provoke another to send a challenge. *R. v. Philippe*, 6 East, 464. The sending the challenge is the offence; and whether it reach the person to whom it is sent or not, is immaterial. The defendant, therefore, may be indicted in the county in which the letter containing it was put into the post. *R. v. Williams*, 2 Campb. 506.

(t) 1 Hawk. P. C. 193.

(675) Forcible entry and detainer are common-law misdemeanors in distinction from felony, and are indictable offenses without regard to any statute. See *Henderson's Case*, 8 Gratt. (Va.) 708; *Butte v. Voorhees*, 1 Green (N. J.), 18; *Com. v. Shattuck*, 4 Cush. (Mass.) 141; *State v. Wilson*, 8 Mo. 125; *State v. Morris*, id. 127; *State v. Speirin*, 1 Brev. (S. C.) 119. In most of the States the injured party may now seek his remedy by statutory proceedings in a civil tribunal.

(676) The offense is complete when the invitation to fight is in any way delivered (*State v. Taylor*, 1 Tread. [S. C.] 107); and the words of the challenge are immaterial. *Gordon v. State*, 4 Mo. 375; *Ivey v. The State*, 12 Ala. 276; *Com. v. Pope*, 8 Dana (Ky.), 418. But see *Angler v. People*, 84 Ill. 486. So the offense is indictable although the contemplated duel is to take place in another country or State. *Ivey v. State*, 12 Ala. 276; *State v. Farrier*, 1 Hawks. (N. C.) 487; *State v. Taylor*, 8 Brev. (S. C.) 243. And even though the challenge is to fight with weapons not deadly, the offense is indictable. Id.; *Com. v. Whitehead*, 2 Boston Law Rep. 148.

(677) Libel is an indictable offense at common law in the United States, as well as in England. *Com. v. Chapman*, 13 Metc. (Mass.) 68; *Com. v. Holmes*, 17 Mass. 336; *State v. Burnham*, 9 N. H. 34. For definitions of the offense, see *Com. v. Clap*, 4 Mass. 163, 168; *State v. Furley*, 4 McCord (S. C.), 317; *Steele v. Southwick*, 9 Johns. 214; *State v. Jeandell*, 5 Harr. (Del.) 475.

The mere attempt to publish a libel is an indictable offense. Thus the transmission of a sealed letter containing libelous matter is indictable. *Hodges v. The State*, 5 Humph. (Tenn.) 112. And the full criminal offense is committed, though the libel reaches the ears of none but the person to whom it is sent. *State v. Avery*, 7 Conn. 266.

The imputation of a crime would seem sufficient to render a publication libelous in every case (*Walker v. Winn*, 8 Mass. 248; *State v. White*, 7 Ired. [N. C.] 180; *Hillhouse v. Dunning*, 6 Conn. 139); but a publication may be libelous without any such imputation. Id.; *Steele v. Southwick*, 9 Johns. 214; *State v. Henderson*, 1 Rich. (S. C.) 179; *Clark v. Binney*, 2 Pick. (Mass.) 118.

public peace, by stirring up the object of it to revenge, perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law (u): and therefore the sending an abusive private letter to a man is as much * a libel as if it were openly printed, for it equally tends to a breach of the peace (x). Moreover, the statute 6 & 7 Vict. c. 96, s. 3, enacts, that if any person shall publish or threaten to publish a libel upon any other person, or shall, directly or indirectly, threaten to print or publish, or propose to abstain from printing or publishing, or offer to prevent the printing or publishing of, any matter or thing touching any other person, with intent to extort any money or security, or any valuable thing, from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, the offender on conviction shall be liable to imprisonment, with or without hard labour, for any term not exceeding three years. It is expressly provided that this enactment shall not affect the law relating to the sending or delivery of threatening letters or writings (y).

At common law it was immaterial with respect to the essence of a libel, whether the matter of it were true or false: the provocation, not the falsity, being criminally punishable, by reason of its tendency to disturb the public peace. But now, by s. 4 of the statute just cited, the falsehood of the libel is made an essential element in the guilt of the defendant: it being enacted thereby, that if any person shall maliciously publish any defamatory libel, "knowing the same to be false," he shall be liable, on conviction, to imprisonment for any term not exceeding two years, and to pay such fine as the court shall award. The 6th section of the same statute further enacts, that on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as is thereafter mentioned, "the truth of the matters charged may be inquired into;" but shall not amount to a defence, unless [* 175] it was for the public benefit * that they should be published: and that, to entitle the defendant to give evidence of their truth, it shall be necessary for him, in pleading, to allege the truth of the matters charged, in the manner required in pleading a justification to an action for defamation (z), and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit; to which plea the prosecutor may reply generally, denying the whole: and if after such plea the defendant shall be convicted, the court may consider, in pronouncing sentence, whether his guilt is aggravated or mitigated by the plea, and the evidence given to prove or disprove it. Further it is provided, that the truth of the matters charged in the libel shall in no case be inquired into without such plea of justification. The defendant may also plead not guilty, and every defence which it is by law competent to him to make under that plea, is reserved to him. (678)

(u) As to proof of publication, see *R. v. Burdett*, 4 B. & Ald. 95; 8 *Ib.* 717; *Lambe's Case*, Moore, 818.

(x) *Edwards v. Wootton*, 12 Rep. 35; *Hick's Case*, Hob. 215; 1 Hawk. P. C. 195.

(y) *Ante*, p. 166.

(z) *Ante*, vol. iii.

(678) The general rule at the common law is that the truth cannot be given in evidence as a defense in a criminal prosecution for a libel. *State v. Lehre*, 8 Brev. (S. C.) 446; *State v. Burdham*, 9 N. H. 34; *Com. v. Clap*, 4 Mass. 168; *Com. v. Sanderson*, 8 Penn. Law Jour. 269. See *People v. Crowell*, 3 Johns. Cas. 337. In many of the States, however, this rule

For a long time, and during a critical period in our history, the question who were the proper judges of the character of the matter charged in an indictment as libellous—the court or the jury—was much contested, and eminent judges ruled that the fact of writing, printing, or publishing the alleged libel and the truth of the innuendos inserted in the indictment, were alone to be submitted to the jury,—that with the guilt or innocence of the accused generally they had no concern (a). The important question thus agitated was settled by Mr. Fox's Libel Act, the 32 Geo. 3, c. 60, intitled "An Act to remove Doubts respecting the Functions of Juries in case of Libel." This statute, after reciting that "doubts have arisen," whether on the trial of an indictment or information for making or publishing any libel, where an * issue is joined between the crown and the defendant, on the plea of [* 176] not guilty, "it be competent to the jury, impannelled to try the same, to give their verdict on the whole matter in issue," proceeds to declare (b) and enact, "that on every such trial, the jury sworn may give a general verdict of guilty or not guilty, upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants, of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information." But it is provided, that the court shall direct the jury according to their discretion, as in other criminal cases (c); that the jury shall have the same liberty as in regard

(a) *R. v. Dean of St. Asaph*, 21 St. Tr. 837; *R. v. Woodfall*, 20 Id. 895; *R. v. Cuthell*, 27 Id. 641.

(b) In *R. v. Cobbett*, 29 St. Tr. 1, 49, Lord Ellenborough, C. J., thus addressed the jury in reference to the above enactment:—"I never doubted that an English jury had the right of judging in these cases, not only of the fact of publication, but also of the nature and construction of the thing published. The Act of Parliament is merely declaratory;

and, had it not passed, I should nevertheless have submitted the whole case to your consideration. On the three following points you have to exercise your judgment:—first, the preliminary allegations and innuendos; secondly, the fact of publication; thirdly, the quality and sense of the thing published. This is the matter at issue."

(c) See further as to the duty of the judge at a trial for libel, *post*, p. 178.

has been limited by statutory or constitutional provisions, substantially to the effect that the truth may be given in evidence as a defense, when it appears that the publication was made with good motives and for justifiable ends. See *Com. v. Snelling*, 15 Pick. (Mass.) 337; *Com. v. Bonner*, 9 Metc. (Mass.) 410; *Barthelemy v. People*, 2 Hill, 248; *State v. White*, 7 Ired. (N. C.) 180. Among the States adopting this limitation of the common-law rule may be mentioned Maine, Massachusetts, New York, Pennsylvania, Ohio, Delaware, Michigan, Indiana, Illinois, Kentucky, Arkansas, and Mississippi.

A statute of the United States applicable to the District of Columbia provides that "the truth may be given in evidence under the general issue as a justification of the alleged libel; and if it appears that the matter charged as libelous was true, or published with good motives or justifiable ends, the defendant shall be acquitted." Stat. of Feb. 25, 1865; 13 Stat. at Large, ch. 58, p. 489.

If the publication be malicious, the defendant is guilty of libel although the words be true, and were uttered under a sense of duty. *Gage v. Robinson*, 12 Ohio, 250; *Com. v. Sanderson*, 8 Penn. Law Jour. 259; *People v. Stone*, 5 Boston Law Rep. 158. And this rule is in no way affected by the fact that by the law the truth is in such case admissible. *Stow v. Converse*, 4 Conn. 17; *Com. v. Snelling*, 15 Pick. (Mass.) 337; *Root v. King*, 7 Cow. 618; *Sterling v. Sherwood*, 20 Johns. 204. So where a party attempts to justify by proving the truth, the justification must be as broad as the charge. It is not sufficient to show that part of the matter is true. *State v. Burnham*, 9 N. H. 34; *Usher v. Severance*, 20 Me. 9.

to other offences of finding a special verdict, and the defendant the same right of moving in arrest of judgment, which was allowed him before the passing of the statute.

Whether, however, a particular publication be so far noxious in its bearing and tendencies, as to amount in the abstract to a libel, is a pure question of law. But if the publication in consideration of law be libellous, then it is a question of fact for the jury, whether it was wilfully and maliciously published, subject, however, to the ordinary presumption of law, that in the [* 177] absence of proof * to the contrary, a man intends that which is the natural consequence of his act. Proof of the public sale or exposure to sale of a libellous paper in the defendant's shop by his servant is at common law sufficient *prima facie* evidence to convict the master of the house or shop of a publication. In such a case publication by the servant is presumed to be with the assent of the master, and so to have been equivalent to publication by him (*d*). However, in this particular a material change for the better has been made by the stat. 6 & 7 Vict. c. 96, s. 7, which provides, that whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant, by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and did not arise from want of due care or caution on his part. (679)

The criminal procedure for any libel inserted in a newspaper has been much facilitated by express enactment. The principal statute now operative upon this subject is the 6 & 7 Will. 4, c. 76 (*e*), which in substance provides that, where the libel complained of is contained in a newspaper, and the defendant is indicted for having printed and published it, in order to prove the defendant to be printer, publisher, or proprietor of the newspaper, a certified copy of the affidavit, filed at the stamp-office in pursuance of sec. 6 (which mentions the names and places of abode of the printer, publisher, and proprietors of the paper, title of the paper, and the place where it is printed), will be conclusive evidence against the persons who signed the affidavit, and *prima facie* evidence against others therein mentioned, of a publication by the par- [* 178] ties described * therein as printer, publisher, and so forth, in a newspaper, entitled in the same manner as that mentioned in the affidavit, and bearing the same names as the printer and publisher, and the same place of printing (*f*); and this certified copy, on proof of the signature of the officer making it, is evidence, not only of the contents of the affidavit, but also of its having been duly sworn by the persons who appear by the copy to

(*d*) *R. v. Almon*, 20 St. Tr. 808, 88, 842; *R. v. Cuthell*, 27 Id. 641; *R. v. Lovett*, 9 C. & P. 462. (*e*) See also 60 Geo. 3, c. 9, s. 8; 11 Geo. 4 & 1 Will. 4, c. 73. (*f*) S. 8.

(679) It has uniformly been the law in this country, even in the absence of any statutory guarantee, that it is the right of the jury to give their verdict on the whole issue, and to decide the question whether the matter charged be libellous or not, as well as the question of fact as to the publication and the truth of the innuendoes. *State v. Allen*, 1 McCord (S. C.), 525; *State v. Lehre*, 2 Brev. (S. C.) 446; 2 Whart. Crim. Law, § 2584. See *People v. Crosswell*, 3 Johns. Cas. 387.

have sworn it (*g*). By the 13th sect. of the same statute, the printer or publisher of every newspaper is obliged to deliver at the stamp-office one of the papers so published, signed by him, with his name and place of abode; and the commissioners of stamps, on application by any person, are required to produce the same in evidence, or may give it to the person applying for that purpose, on receiving reasonable security for its return (*h*).

The office of the judge who presides at a criminal trial is in general to define the crime; the province of the jury being to find whether or not the accused person has committed that particular offence. By Mr. Fox's Act, as already stated (*i*), the practice at a trial for libel was assimilated to that which in other cases had obtained. Neither the jury nor the parties consequently can require from the court any specific and direct opinion upon the case *sub judice*, but the course has long been for the judge first to give a legal definition of the offence, and then to leave it to the jury to say whether the facts necessary to constitute that offence have been proved to their satisfaction. "A publication, without justification or lawful excuse, which is calculated to injure the reputation of another by exposing him to hatred, contempt, or ridicule is a libel. Whether the particular publication, the subject of enquiry, is of that character, and would be likely to produce that effect, is a question upon which a jury is to *exercise their judgment, and pronounce their opinion [* 179] as a question of fact" (*j*). The judge, as a matter of advice to them in deciding that question, may indeed give his own opinion as to the nature of the publication, but is not bound to do so as a matter of law (*k*).

At common law the punishment for libel is fine, and the finding sureties to keep the peace (*l*); and now, as we have seen, the publication of a defamatory libel, with knowledge of its falsehood, subjects the offender to imprisonment not exceeding two years, and fine (*m*). And the malicious publication of any defamatory libel renders the party liable, on conviction, to fine or imprisonment, or both, the imprisonment not to exceed the term of one year (*n*).

In the above and the other cases formerly considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is essential to the nature of a free state; but this consists in laying no previous restraints upon publications not in allowing freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution (*o*),

(*g*) *Id.*

(*h*) See also s. 14. Reports of papers published by the authority of parliament are expressly privileged, by the stat. 3 Vict. c. 9, against criminal proceedings for alleged libellous matter contained therein.

(*i*) *Ante*, p. 175.

(*j*) *Per* Parke, B., *Parmiter v. Coupland*, 6 M. & W. 107-8.

(*k*) *Id.* *Et vide*, *per* Byles, J., *Paris v. Levy*, 9 C. B. N. S. 364. *R. v. Burdett*, 4 B. & Ald. 95.

(*l*) 1 Hawk. P. C. 196.

(*m*) 6 & 7 Vict. c. 93, s. 4.

(*n*) *Id.* s. 5.

(*o*) The art of printing, soon after its introduction, was looked upon (as well in England as in other countries) as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of star-chamber; which limited the number of

[*180] is to subject freedom of sentiment to the * prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And the only plausible argument heretofore used for restraining the just freedom of the press, viz., that it was necessary to prevent the daily abuse of it—will entirely lose its force, when it is [*181] shewn (by a seasonable exertion of the laws) that the press * cannot be abused to any bad purpose, without incurring a suitable punishment: whereas it never can be used to any good one, when under the control of an inspector. So true will it be found, that to censure the licentiousness, is to maintain the liberty, of the press. (680)

printers, and of presses which each should employ, and prohibited new publications, unless previously approved by proper licensers. On the demolition of this odious jurisdiction in 1641, the long parliament of Charles I. after their rupture with that prince, assumed the same powers as the starchamber had exercised with respect to the licensing of books; and in 1648, 1647, 1649, and 1652 (Scobell, i. 44, 184; ii. 88, 280) issued their ordinances for that purpose, founded principally on the starchamber decree of 1637. In 1683 was passed the statute 13 & 14 Car. 2, c. 33, which (with some few alterations) was

copied from the parliamentary ordinances. This act expired in 1679, but was revived by statute 1 Jac. 2, c. 17, and continued till 1693. It was then continued for two years longer by statute 4 Will. & M. c. 24; but though frequent attempts were made by the government to revive it, in the subsequent part of that reign (Com. Journ. 11 Feb. 1694; 26 Nov. 1695; 23 Oct. 1696; 9 Feb. 1697; 31 Jan. 1698), yet the parliament resisted it so strongly, that it finally expired, and the press became properly free in 1694; and has ever since so continued.

(680) This subject, "the liberty of the press," will be found elaborately discussed in the following cases: *People v. Cronwell*, 3 Johns. Cas. 386; S. C., 8 Wheeler's Crim. Cas. 329; *Thomas v. Cronwell*, 7 Johns. 264; *King v. Root*, 4 Wend. 113. And see *Cramer v. Riggs*, 17 Wend. 209; *Steele v. Southwick*, 9 Johns. 214; *Scheckell v. Jackson*, 10 Cush. (Mass.) 25; *Robbins v. Treadway*, 2 J. J. Marsh. (Ky.) 540; *Sandford v. Bennett*, 24 N. Y. (10 Smith) 20; *Reads v. Sweetser*, 6 Abb. N. S. 9, note; *More v. Bennett*, 48 N. Y. (8 Sick.) 472.

An editor may comment freely on the acts of government, officers or individuals, and indulge in occasional mirth and wit, and it is only when the character of the publication is malicious, and its tendency to degrade and excite to revenge, that it is condemned by the law, and subjects the publisher to prosecution. *Tappan v. Wilson*, 7 Ohio, 190, 193.

* CHAPTER XL.

[* 182]

OFFENCES AGAINST PUBLIC TRADE.

OFFENCES against public trade, so far as they fall within the scope of this portion of our Commentaries, may very briefly be discussed:—

I. Smuggling is the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise, or of importing or exporting goods which are prohibited. This was from time to time restrained by statutes, which have been recast and consolidated in the 16 & 17 Vict. c. 107, whereby persons are to be adjudged guilty of felony:—

1. Who, to the number of three or more armed with firearms or other offensive weapons, are within the United Kingdom, or within the limits of any port, harbour, or creek thereof, assembled in order to be aiding and assisting in the illegal landing, running, or carrying away of any prohibited goods, or goods liable to duties which have not been paid, or secured, or in rescuing or taking away such goods after seizure from the officer of the customs or other officer authorised to seize the same, or from any person or persons employed by them or assisting them, or from the place where the same have been lodged by them, or in rescuing any person who may have been apprehended for an offence made felony by any act relating to the customs, or in preventing the apprehension of any person guilty of such offence, and any persons who, to the number * of three or more, so armed as aforesaid within the United Kingdom, or within the limits of any port, harbour, or creek thereof, are so aiding or assisting (a). [* 183]

2. Any person who, in company with more than four others, is found with any goods liable to forfeiture under any act relating to the customs or excise, or in company with one other person within five miles of the sea-coast or of any navigable river, and carrying offensive arms or weapons, or disguised in any way (b).

By the 244th section, any person who, after sunset and before sunrise, between the 21st of September and 1st of April, or after eight in the evening and before six in the morning, at any other time in the year, makes, aids, or assists in making any signal, on board any vessel, or on any part of the coast of the United Kingdom, or within six miles of the coast, for the purpose of giving notice to any person on board any smuggling vessel, is rendered guilty of a misdemeanor (c).

II. Another offence against public trade is fraudulent bankruptcy, in connection with which I shall here barely mention the several species of fraud taken notice of by the statute law.

(a) S. 248. Punishment: penal servitude for life, or for not less than fifteen years; or imprisonment for not more than three years.

(b) S. 250. Punishment: penal servitude for not more than seven, nor less than five years.

As to the offence of shooting at revenue vessels, or officers of the customs, *post*, chap. 13.

(c) Punishment: a fine of 100*l.*, or imprisonment with hard labour for any term not exceeding one year.

By the 24 & 25 Vict. c. 134, s. 221 (*d*), a bankrupt who does, or omits to do any of the acts or things following, with intent to defraud or defeat the rights of his creditors, is guilty of a misdemeanor, and liable at the discretion of the court before which he may be convicted, to imprisonment for not more than three years.*

(*d*) See the remarks upon the various clauses of this section, Griffith and Holmes' Bankruptcy, ii. pp. 1092-9.

* As from Jan. 1, 1870, the stat. 24 & 25 Vict. c. 134, is repealed (by 32 & 33 Vict. c. 83), and the punishment of fraudulent debtors will be such as is prescribed by the 32 & 33 Vict. c. 82, enacting as under:—

SECT. 11. That any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act, 1869, shall, in each of the cases following, be deemed guilty of a misdemeanor, and, on conviction thereof, be liable to be imprisoned for any time not exceeding two years, with or without hard labour; that is to say,

1. If he does not, to the best of his knowledge and belief, fully and truly discover to the trustee administering his estate for the benefit of his creditors all his property, real and personal, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intent to defraud:

2. If he does not deliver up to such trustee, or as he directs, all such parts of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud:

3. If he does not deliver up to such trustee, or as he directs, all books, documents, papers, and writings in his custody or under his control relating to his property or affairs, unless the jury is satisfied that he had no intent to defraud:

4. If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals any part of his property to the value of ten pounds or upwards, or conceals any debt due to or from him, unless the jury is satisfied that he had no intent to defraud:

5. If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently removes any part of his property of the value of ten pounds or upwards:

6. If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud:

7. If, knowing or believing that a false debt has been proved by any person under the bankruptcy or liquidation, he fail for the period of a month to inform such trustee as aforesaid thereof:

8. If after the presentation of a bankruptcy petition against him or the commencement of the liquidation he prevents the production of any book, document, paper, or writing affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law:

9. If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation, or falsification of any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law:

10. If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he makes, or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law:

11. If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently parts with, alters, or makes any omission, or is privy to the fraudulently parting with, altering or making any omission in any document affecting or relating to his property or affairs:

12. If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or at any meeting of his creditors within four months next before such presentation or commencement, he attempts to account for any part of his property by fictitious losses or expenses:

13. If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same:

14. If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless the jury is satisfied that he had no intent to defraud:

15. If within four months next before the presentation of a bankruptcy petition against him, or the commencement of the liquidation,

* 1. If he do not upon the day limited for his surrender, and [* 184] before three o'clock of such day, or at the hour and upon the day allowed him for finishing his examination, after notice thereof in writing served upon him personally or left at his usual or last known place of abode or business, and after due notice in the *Gazette*, surrender himself to the court (having no lawful impediment allowed by the court), and sign or subscribe such surrender, and submit to be examined before such court from time to time.

2. If he do not, upon his examination, fully and truly discover to the best

he, being a trader, pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud:

16. If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to any agreement with reference to his affairs or his bankruptcy or liquidation.

Sect. 12. That if any person who is adjudged a bankrupt or has his affairs liquidated by arrangements after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months before such presentation or commencement, quits England and takes with him, or attempts or makes preparation for quitting England and for taking with him, any part of his property to the amount of £20 or upwards, which ought by law to be divided amongst his creditors, he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of felony, punishable with imprisonment for a time not exceeding two years, with or without hard labour.

Sect. 13. That any person shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any term not exceeding one year, with or without hard labour; that is to say,

(1.) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud:

(2.) If he has with intent to defraud his creditors, or any of them, made or caused to be made any gift, delivery, or transfer of or any charge on his property:

(3.) If he has, with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him.

Sect. 14. That if any creditor in any bankruptcy or liquidation by arrangement or composition with creditors in pursuance of the Bankruptcy Act, 1869, wilfully and with intent to defraud makes any false claim, or any proof, declaration, or statement of account which is untrue in any material particular, he shall be guilty of a misdemeanor, punishable with imprisonment not exceeding one year, with or without hard labour.

Sect. 15. That where a debtor makes any arrangement or composition with his creditors under the provisions of the Bankruptcy Act, 1869, he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the arrangement or composition he obtained forbearance, by any fraud, provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting dividends.

Sect. 16. That where a trustee in any bankruptcy reports to any court exercising jurisdiction in bankruptcy that in his opinion a bankrupt has been guilty of any offence under this act, or where the court is satisfied upon the representation of any creditor or member of the committee of inspection that there is ground to believe that the bankrupt has been guilty of any offence under this act, the court shall, if it appears to the court that there is a reasonable probability that the bankrupt may be convicted, order the trustee to prosecute the bankrupt for such offence.

Sect. 17. That where the prosecution of the bankrupt under this act is ordered by any court, then, on the production of the order of the court, the expenses of the prosecution shall be allowed, paid, and borne as expenses of prosecutions for felony are allowed, paid, and borne.

Sect. 18. That every such misdemeanor as aforesaid shall be deemed to be an offence within and subject to the provisions of the stat. 22 & 23 Vict. c. 17, intituled, "An Act to prevent vexatious indictments for certain misdemeanors;" and when any person is charged with any such offence before any justice or justices, such justice or justices shall take into consideration any evidence adduced before him or them tending to show that the act charged was not committed with a guilty intent.

It is by the 32 & 33 Vict. c. 62, further enacted,

Sect. 20. That so much of the stat. 5 & 6 Vict. c. 38, "to define the jurisdiction of justices in general and quarter sessions of the peace," as excludes from the jurisdiction of justices and recorders at sessions of the peace or adjournments thereof the trial of persons for offences against any provision of the laws relating to bankrupts, is hereby repealed as from the passing of this act; and any offence under this act shall be deemed to be within the jurisdiction of such justices and recorders.

of his knowledge and belief all his property real and personal, inclusive of his rights and credits, and how, and to whom, and for what consideration, and when he disposed of, assigned or transferred any part thereof, except such part as may have been really *bond fide* before sold or disposed of in the way of his trade or business, if any, or laid out in the ordinary expense of his family, or does not deliver up to the court or dispose, as the court directs, of all such part thereof as is in his possession, custody, or power, except the necessary wearing apparel of himself, his wife, and children, and deliver up to the court all books, papers, and writings in his possession, custody, or power relating to his property, or affairs.

3. If, after adjudication, or within sixty days prior to adjudication, with intent to defraud his creditors, the bankrupt removes, conceals, or embezzles any part of his property to the value of 10% or upwards.

4. If, in case of any person having to the knowledge or belief of the bankrupt, proved a false debt under the bankruptcy, he fail to disclose the same to his assignees within one month after coming to the knowledge or belief thereof.

5. If the bankrupt, with intent to defraud, wilfully and fraudulently omits from his schedule any effects or property whatsoever.

[* 185] * 6. If the bankrupt, after the filing of the petition for adjudication, with intent to conceal the state of his affairs or to defeat the object of the law of bankruptcy, conceals, prevents, or withholds the production of any book, deed, paper, or writing relating to his property, dealings, or affairs.

7. If the bankrupt, after the filing of the petition for adjudication, or within three months next before adjudication, with intent to conceal the state of his affairs, or to defeat the objects of the law of bankruptcy, parts with, conceals, destroys, alters, mutilates, or falsifies, or causes to be concealed, destroyed, altered, mutilated, or falsified any book, paper, writing, or security, or document relating to his property, trade, dealings, or affairs, or makes or is privy to the making of any false or fraudulent entry or statement in or omission from any book, paper, document, or writing relating thereto.

8. If, within the like time, the bankrupt, knowing that he is unable to meet his engagements, fraudulently, and with intent to diminish the sum to be divided amongst the general body of his creditors, have made away with, mortgaged, encumbered, or charged any part of his property, or if, after adjudication, he conceals from the court or his assignee any debt due to or from him.

9. If, being a trader, the bankrupt shall under his bankruptcy, or at any meeting of his creditors, within three months next preceding the filing of the petition for adjudication, attempt to account for any of his property by fictitious losses or expenses.

10. If, being a trader, the bankrupt has within three months next before the filing of the petition for adjudication, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, obtained on credit from any person goods or chattels with intent to defraud.

11. If, being a trader, the bankrupt has, with intent to defraud his creditors, [* 186] within three months next * before the filing of the petition for adjudication, pawned, pledged, or disposed of otherwise than by *bond fide* transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for.

III. Cheating is another offence, more immediately against public trade; as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man. Hither therefore may be referred that prodigious multitude of statutes, which have been made to restrain and punish deceits in particular trades, and which are enumerated by Hawkins and Burn, but are chiefly of use among traders themselves (e).

Fraud, when levelled at the public, is indictable at common law (f); and to this head of cheating is referable in a peculiar manner the offence of selling by false weights and measures; the standard of which fell under our consideration in a former volume (g).

Forgery also is indictable at common law (h); *ex. gr.*, the uttering of a forged testimonial to character, knowing it to be forged (i). And if a person in the course of his trade or business, openly and publicly carried on, put a false mark or token upon an article so as to pass it off as genuine when in fact it is spurious, and the article is sold and money is obtained by means of that false mark or token, that will constitute a cheat at common law (k). * For the [*187] repression of this latter form of fraud, viz., the fraudulent marking of merchandise, has recently been enacted the statute 25 & 26 Vict. c. 88, whereby is declared guilty of a misdemeanor (l):—

1. Every person who, with intent to defraud (m), or to enable another to defraud, any person, shall forge or counterfeit (n), or cause or procure to be forged or counterfeited, any trade-mark (o), or shall apply, or cause to be applied, any trade-mark to any article not being the manufacture, production, or merchandise of any person denoted or intended to be denoted by such trade-mark, or not being the manufacture, production, or merchandise of any person whose trade-mark shall be so forged or counterfeited, or shall apply, or cause to be applied, any trade-mark to any chattel, not being the particular or

(e) See Mr. Oke's very useful Magisterial Synopsis, which contains a list of offences: 1, summarily punishable; 2, indictable, with the penal consequences of each, and references to the statutes applicable.

(f) *R. v. Wheatley*, 2 Burr. 1125; *Reg. v. Eagleton*, Dears. 376, 575; *R. v. Haynes*, 4 M. & S. 214.

(g) Vol. I.

(h) *R. v. Hales*, 17 St. Tr. 161; *Reg. v. Boulton*, 2 Car. & K. 604; *R. v. Diarm*, 3 M. & S. 11.

(i) *Reg. v. Sharman*, Dears. 285; *Reg. v. Moah*, Dears. & B. 550. See 32 Geo. 3, c. 56.

(k) *Reg. v. Oloss*, Dears. & B. 460; *Reg. v. Smith*, *Id.* 566. The general punishment for fraud indictable at common law is fine and imprisonment, to which hard labour may be added. 1 Hawk. P. C. 188; 14 & 15 Vict. c. 100, s. 29.

(l) Punishment: imprisonment for not more than two years, with or without hard labour, or fine, or both by imprisonment with or without hard labour and fine, and also imprisonment until the fine (if any) shall have been paid and satisfied. S. 14.

Also, by ss. 2 and 3, a forfeiture of the chattel to which the trade-mark has been fraudulently applied is incurred by the mis-

demeanant. And by s. 4, the vendor of a chattel which he knows to bear a fraudulent trade-mark is liable to a penalty.

(m) By s. 12 an intention to defraud any particular person need not be alleged in the indictment, or proved; but it shall be sufficient to allege and prove, with respect to every such misdemeanor and offence, that the person accused did the act charged with intent to defraud, or with intent to enable some other person to defraud.

(n) By s. 5, every addition to and alteration or imitation of a trade-mark made with intent to defraud, shall be deemed to be a forged and counterfeit trade-mark.

(o) By s. 1, the expression "trade-mark" is defined to include any name, label, or mark lawfully used by any person to denote a chattel to be of the manufacture, production, or merchandise of such person, or to be an article of any particular description made or sold by such person, and shall also include any name, mark, or sign which in pursuance of any statute relating to registered designs is to be put upon or attached to any chattel or article during the existence of any copyright or other sole right acquired under the provisions of such statute.

[*188] peculiar description of manufacture, production, or *merchandise denoted or intended to be denoted by such trade-mark (*p*).

2. Every person who, with intent to defraud, or to enable another to defraud, shall apply or cause to be applied any trade-mark to any vessel, case, wrapper, label, or other thing in, or with which any article shall be intended to be sold, or intended for any purpose of trade or manufacture (*q*).

3. Every person who aids, abets, counsels, or procures the commission of any offence which is by the above act made a misdemeanor (*r*).

Besides the foregoing statute, which has been directed against an ordinary species of fraud productive of pernicious consequences to trade, other fraudulent practices have from time to time been singled out by the legislature for repression by enactments, of which the more important are below collected (*s*). (681)

IV. A monopoly is a licence or privilege allowed by the crown for the sole buying and selling, making, working, or using of anything whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before (*t*). The granting of exclusive privileges had been carried to an enormous height during the reign of Queen Elizabeth: and this abuse was complained of by Sir Edward Coke (*u*), [*189] in the *beginning of the reign of king James the First: but was in great measure remedied by statute 21 Jac. 1, c. 3, which declared such monopolies, except as to patents, to be contrary to law and void (*x*).

(*p*) S. 2.

(*q*) S. 3.

(*r*) S. 18.

(*s*) See the Merchant Shipping Acts, 17 & 18 Vict. c. 104; 19 & 20 Vict. c. 41, s. 6; 14 & 15 Vict. c. 102, s. 55. As to the prevention of frauds in the hop trade, see 29 Vict. c. 87, amending 54 Geo. 3, c. 123; in the hay and straw trade, 19 & 20 Vict. c. 114.

By the 30 & 31 Vict. c. 29, s. 1, a person

wilfully inserting in any contract for the sale or purchase of shares in a joint-stock banking company, any false entry of the numbers of such shares, or of the name of the person registered as proprietor thereof, shall be guilty of a misdemeanor, and punishable accordingly.

(*t*) 1 Hawk. P. C. 235.

(*u*) 8 Inst. 181.

(*x*) *Ante*, vol. ii.

(681) To constitute a cheat or fraud an indictable offense at common law, it must be such a fraud as would affect the public; such a deception as common prudence cannot guard against; as by using false weights and measures, or false tokens, or where there is a conspiracy to cheat. *People v. Babcock*, 7 Johns. 201. And see *State v. Stroll*, 1 Rich. (S. C.) 244; *Hill v. State*, 1 Yerg. (Tenn.) 76; *Com. v. Morse*, 2 Mass. 139; *Com. v. Warren*, 6 id. 72; *Lambert v. People*, 9 Cow. 588; *People v. Stone*, 9 Wend. 187; *State v. Patillo*, 4 Hawks. (N. C.) 348; *Cross v. Peters*, 1 Greenl. (Me.) 387.

To sell provisions by short measure, where no false weight or token is used, is not an offense at common law. *State v. Justice*, 2 Dev. (N. C.) 149; *Hartmann v. Com.*, 5 Barr (Penn.), 60. So, where one by lying only, without using any false weights, measures, or tokens, defrauds another of his property, the injury is a civil one, and an indictment cannot be supported as for a public offense. *Com. v. Warren*, 6 Mass. 72; see *Hartmann v. Com.*, 5 Barr (Penn.), 60; *State v. Sumner*, 10 Vt. 587; *People v. Miller*, 14 Johns. 371; *People v. Babcock*, 7 id. 201; *State v. Delyon*, 1 Bay (S. C.), 353; *Com. v. Hearsey*, 1 Mass. 137.

Receiving grain on storage for hire, or buying grain, by false weights, is an indictable cheat at common law. *People v. Fish*, 4 Park. 206. So, cheats by means of false news, see *State v. Williams*, 2 Tenn. 108; false notes, *Com. v. Boynton*, 2 Mass. 77; *State v. Stroll*, 1 Rich. (S. C.) 244; *Lewis v. Com.*, 2 Serg. & R. (Penn.) 551; *Com. v. Speer*, 2 Va. Cas. 65; false dice, or false trade-marks, see *Res. v. Teischer*, 1 Dall. 335; *People v. Gates*, 13 Wend. 311, 319, are all indictable at the common law.

A cheat, being a misdemeanor at common law, is punishable by fine and imprisonment, or either, at the discretion of the court. See *State v. Roberts*, 1 Hayw. (N. C.) 176; *United States v. Coolidge*, 1 Gallis. 488, 493.

It is also worthy of remark that "every practice or device by art, conspiracy, words, or news to enhance the price of victuals or other merchandise," was punishable by the common law (y), and that the 7 & 8 Vict. c. 24 (an act for abolishing the offences of forestalling (z), regrating (a), and engrossing (b), and for repealing certain statutes passed in restraint of trade), provides (s. 4) that nothing therein contained "shall be construed to apply to the offence of knowingly or fraudulently spreading or conspiring to spread any false rumour with intent to enhance or decry the price of any goods or merchandise, or to the offence of preventing or endeavouring to prevent by force or threats any goods, wares, or merchandise, being brought to any fair or market, but that every such offence may be inquired of, tried, and punished" as before the passing of the act. It is therefore still a misdemeanor.

V. Combinations amongst persons to effect certain objects which are presently specified, being very *prejudicial to the community, have by various statutes been rendered or declared [*190] to be illegal, and combinations accompanied with violence are in some cases severely punishable.

The law relating to combinations amongst workmen is for the most part set forth in the stat. 6 Geo. 4, c. 129 (repealing many former enactments upon the subject) as amended by the 22 Vict. c. 34. The first-mentioned statute renders it illegal "by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another," to force or endeavour to force any workman to leave his employment, or to return his work unfinished, or to prevent him from hiring himself, or to compel him to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or to use violence, threats, or intimidation to or molest or obstruct any workman on account of his refusing to comply with any resolutions or regulations concerning the rate of wages, the hours of working, and so forth, or in like manner, as above set forth, to force or endeavour to force any manufacturer to alter the mode of carrying on his business (c). Provided that it shall not be illegal for persons to meet together for the sole purpose of consulting upon and determining the rate of wages or prices of the hours of work, whether the persons so meeting be the workmen (d) or the masters (e). An infraction of the above enactment subjects the offender upon summary conviction to imprisonment with or without hard labour for any time not exceeding three calendar months (f); an appeal, however, lies against such conviction to the quarter sessions. The 22 Vict. c. 34 (g) declares and enacts as follows: "That no workman or other person, whether actually in

(y) 3 Inst. 196.

(z) Forestalling the market, as described by statute 5 & 6 Edw. 6, c. 14, is the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there, which practices make the market dearer to the fair trader.

(a) Regrating is described by the statute 5 & 6 Edw. 6, c. 14, to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles thereof.

(b) Engrossing was the getting into one's possession, or buying up, large quantities of corn or other victuals, with intent to sell them again.

The statutes concerning the above offences were repealed by the 12 Geo. 3, c. 71; but they continued until the enactment cited in the text to be punishable at common law by fine and imprisonment.

(c) 6 Geo. 4, c. 129, s. 3.

(d) Id. s. 4.

(e) Id. s. 5.

(f) Id. s. 8.

(g) See *Reg. v. Rowlands*, 2 Den. 364.

employment or not, shall by reason of his entering into an agreement for the [* 191] purpose * of fixing the rate of wages, or by reason merely of his endeavouring peaceably and in a reasonable manner, and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work," in order to obtain the rate of wages or hours of work agreed upon, shall be deemed to be guilty of "molestation" or "obstruction" within the meaning of the 6 Geo. 4, c. 129. But by a more recent statute it is enacted that any person wilfully committing an assault in pursuance of an unlawful combination or conspiracy to raise the rate of wages, or respecting any trade, or manufacture, or person concerned therein, shall be deemed guilty of a misdemeanor (*h*), and that whosoever shall unlawfully and with force hinder or prevent any seaman, from exercising his lawful occupation, or shall use any violence to any such person with intent to hinder or prevent him from exercising the same, shall, on conviction thereof before two justices of the peace, be liable to be imprisoned and kept to hard labour for any term not exceeding three months (*i*).

By various enactments (*k*) any person hindering the exportation of corn by violence or destroying granaries or grain intended for exportation, or using violence to deter others from buying corn within the kingdom, or unlawfully entering any ship and taking corn therefrom, will, according to the circumstances, render himself liable to punishment on summary conviction before two justices of the peace, or to be indicted for felony; and whosoever shall use any violence or threat of violence to any person, with intent to deter or hinder him from buying or selling, or to compel him to buy or sell any wheat or other grain, flour, meal, malt, or potatoes, in any market or other place, or shall use any such violence or threat to any person having the charge of any [* 192] wheat or so forth, whilst on * the way to or from any market town, or other place, with intent to stop the conveyance of the same, shall, on conviction thereof before two justices of the peace, be liable to be imprisoned and kept to hard labour for any term not exceeding three months (*l*).

VI. Destroying
goods in pro-
cess of manu-
facture, &c.

VI. For the protection of those engaged in the manufacture of goods or in agricultural operations, each of the following offences is to be adjudged a felony:—

1. The unlawfully and maliciously cutting, breaking, or destroying, or damaging, with intent to destroy or to render useless—any goods or articles of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace, being in the loom or frame, or on any machine or engine, or in any stage of manufacture, or any warp or shute of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, any loom, frame, machine, engine, rack, tackle, tool, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles (*m*).

(*h*) 24 & 25 Vict. c. 100, s. 41. Punishment: imprisonment with or without hard labour, for any term not exceeding two years.

(*i*) 24 & 25 Vict. c. 100, s. 40.

(*k*) See 11 Geo. 2, c. 22, ss. 1, 2; 36 Geo. 3, c. 2, ss. 1, 2.

(*l*) 24 & 25 Vict. c. 100, s. 89.

(*m*) 24 & 25 Vict. c. 97, s. 14.

2. The entering into any house, shop, building, or place with intent to commit any of the offences above-mentioned (*n*).

3. The unlawfully and maliciously cutting, breaking, or destroying, or damaging with intent to destroy or to render useless, any machine or engine, whether fixed or * moveable, used or intended to be used for sowing, [* 193] reaping, mowing, thrashing, ploughing, draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except as before mentioned) (*o*).

For other criminal acts which might be viewed as affecting trade, the reader is referred to Chapter XIV., where offences against property generally are considered (*p*).

* CHAPTER XII.

[* 194]

OFFENCES AGAINST THE PUBLIC HEALTH AND SAFETY, MORALS AND ECONOMY.

THE fourth species of offences, more especially affecting the commonwealth, are such as are against the public health and safety, morals and economy; matters of the highest importance, and for the preservation of which our magistrates and public men have been charged with special duties by the legislature. In this chapter, however, our attention will mainly be directed to indictable offences referable to the class indicated. Minor infractions of the law, belonging to the same class, which are summarily punishable, being for the most part unnoticed (*a*).

Regard being had to the remarks above offered, our present object naturally subdivides itself into two portions, of which the first includes offences against the public health and safety; and the second includes offences against the public morals and economy.

I. Foremost amongst offences prejudicial to the public health is that of infringing the quarantine laws, which impose a probation upon ships coming from infected ports, and are now comprised in the stat. 6 Geo. 4, c. 78. By sect. 21 of this act, if any officer of the customs or other person charged with the execution of orders concerning quarantine or the prevention of infection, desert from his duty

First, Offences against the public health and safety.
I. Breaches of quarantine.

(*n*) *Ib.* Punishment: (for each of the offences *supra*), penal servitude for life, or for not less than five years; or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*o*) 24 & 25 Vict. c. 97, s. 15. Punishment: penal servitude for not more than seven nor less than five years; or imprisonment for any

term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*p*) See particularly as to stealing goods in process of manufacture, 24 & 25 Vict. c. 96, s. 62; and as to stealing merchandise from ships, docks, or wharves, *Id.* s. 63.

(*a*) In Mr. Oke's Magisterial Synopsals, these minor offences are enumerated.

[*195] when so employed, and knowingly and * wilfully permit any person, vessel, goods, or merchandise to depart or be conveyed out of the lazaret, or place appointed for the performance of quarantine, unless under authority from the crown or privy council; or shall knowingly give a false certificate that a vessel has duly performed quarantine, he shall be guilty of felony (d): and other less serious infringements of the provisions of the above statute will expose the offender to severe punishment by pecuniary penalties or imprisonment (c).

II. Irrespective of statute, certain acts obviously calculated to prejudice the public health are, on grounds of policy, indictable. Thus it has been held

II. Other acts calculated to prejudice the public health. indictable to expose in a public thoroughfare a person labouring under a contagious disease (d); or to bring a glandered horse into a public square at the risk of causing infection to the queen's subjects (e); and it is a misdemeanor at common law to give to any person injurious food to eat, whether the offender be incited thereto by malice, or by a desire of gain; and whether he be a public contractor or otherwise (f). (682)

III. A common nuisance is an offence against the health, safety, or well-being of the community; being * either the doing of a thing to the annoyance of all the queen's subjects, or the neglecting to do a thing which the common good requires (g). The nature of common or public nuisances, and their distinction from private nuisances, were explained in the preceding volume; when we considered more particularly the nature of a private nuisance as a civil injury to individuals. I shall here only remind the student, that common nuisances are such inconvenient or troublesome offences, as annoy the whole community in general, not merely some particular person; and therefore are indictable, not actionable: as it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow-subjects. The class of indictable nuisances is accordingly very large, comprising acts dissimilar in kind, though in one particular agreeing—that they are

(b) As to the punishment for the above offence, see 7 & 8 Geo. 4, c. 28, ss. 8, 9; 1 Vict. c. 90, s. 5; 20 & 21 Vict. c. 3, s. 2; 27 & 28 Vict. c. 47, s. 2.

(c) 6 Geo. 4, c. 78, ss. 17, 18, 21, 35.

(d) *R. v. Vantandillo*, 4 M. & S. 78; *R. v. Burnett*, Id. 272; 29 & 30 Vict. c. 90, ss. 25, 38.

See the 30 & 31 Vict. c. 84, "An Act to consolidate and amend the Laws relating to Vaccination." By s. 32 of this statute, any person inoculating for the small-pox is liable to imprisonment on summary conviction.

(e) *Reg. v. Henson*, Dears. 24. See also "The Contagious Diseases (Animals) Act, 1867" (30 & 31 Vict. c. 125), and the statutes specified in sched. 1 thereto.

(f) *R. v. Dixon*, 8 M. & S. 11. Judgm. *Burnby v. Bollett*, 16 M. & W. 654; *R. v. Haynes*, 4 M. & S. 214; 26 & 27 Vict. c. 117.

See "The Poisoned Flesh Prohibition Amendment Act, 1864" (27 & 28 Vict. c. 115), which extends the provisions of the 26 & 27 Vict. c. 113.

(g) 1 Hawk. P. C. 197.

(682) A person sick of an infectious or contagious disease, in his own house, or in suitable apartments at a public hotel or boarding-house, is not punishable therefor; nor is it an indictable offense, in his friends declining to remove him. *Boon v. City of Utica*, 2 Barb. 104. But it is indictable to maintain any building or institution likely to generate infection. *Meeker v. Van Rensselaer*, 15 Wend. 397; see *People v. Townsend*, 3 Hill, 479; *State v. Pearce*, 4 McCord (S. C.), 472.

Openly exposing for sale, food that is known to be unwholesome (*Hunter v. State*, 1 Head [Tenn.], 160; *People v. Parker*, 38 N. Y. [11 Tiff.] 85; *State v. Norton*, 2 Ired. [N. C.] 40; *State v. Smith*, 8 Hawks. [N. C.] 878), and the exposure to use of unwholesome water (*State v. Buckman*, 8 N. H. 203), are indictable offenses. *Goodrich v. People*, 3 Park. 623.

done *ad commune nocumentum* (h). (683) Some such acts which are criminal and indictable as injurious to public decency and decorum, will be specified in the second subdivision of this chapter. Amongst public nuisances directly affecting the public health, safety, and well-being may here be mentioned:—

1. Annoyances in, or closely adjoining to (i), highways (k), or affecting bridges (l), and public rivers (m), (684) by rendering the same inconvenient

(h) This technical conclusion to an indictment for a nuisance is not, however, essential. *Reg. v. Holmes*, Dears. 207; 14 & 15 Vict. c. 100, s. 24.

(i) *Barnes v. Ward*, 9 C. B. 392.

(k) The principal act relating to highways is the 5 & 6 Will. 4, c. 50, with which is to be construed as one the 25 & 26 Vict. c. 61, so far as may be consistent with the provis-

ions of the latter act. See also the 4 & 5 Vict. c. 51; 3 Geo. 4, c. 126, s. 110; *Reg. v. Ipstones*, 37 L. J. M. C. 87.

(l) As to repairing public bridges, see stats. 55 Geo. 3, c. 143; 43 Geo. 3, c. 59.

(m) Judgm. *Mayor of Colchester v. Brooke*, 7 Q. B. 377; *Reg. v. Betts*, 18 Q. B. 102; *Reg. v. Charlesworth*, Id. 1023.

(683) Any thing directly deleterious to the health, comfort, or morality of the community at large (*Brooks v. State*, 2 Yerg. [Tenn.] 482; *Com. v. Webb*, 6 Rand. [Va.] 726; *State v. Baldwin*, 1 Dev. & Bat. [N. C.] 195), or to such part of the community as necessarily come in contact with it (*Hackney v. State*, 8 Ind. 494); is an indictable nuisance at common law. Id. See *State v. Wright*, 6 Jones (N. C.), 25, 27; *State v. Hathcock*, 7 Ired. (N. C.) 52; *Com. v. Smith*, 6 Cush. (Mass.) 80; *People v. Jackson*, 7 Mich. 432; *Allen v. State*, 34 Texas, 290; *Savannah, etc., R. R. Co. v. Shields*, 33 Ga. 601.

It is unnecessary to prove that the nuisance is positively injurious to health. If it shocks public morality, offends the senses, or disturbs the comfort of the community, it is sufficient. See *Peak v. State*, 10 Humph. (Tenn.) 99; *State v. Moore*, 1 Swan. (Tenn.) 136; *Lansing v. Smith*, 8 Cow. 146; *Ashbrook v. Com.*, 1 Bush (Ky.), 139; *Com. v. Brown*, 13 Metc. (Mass.) 385. But the discomfort must be physical, not such as affects the taste or imagination merely. *Cleveland v. Citizens' Gas-light Co.*, 20 N. J. Eq. 201. See *Bradley v. People*, 56 Barb. 72; *People v. Sands*, 1 Johns. 78.

No length of time will legalize a nuisance (*People v. Cunningham*, 1 Denio, 524; *Mills v. Hall*, 9 Wend. 315; *Com. v. Upton*, 6 Gray [Mass.] 473; *Ashbrook v. Com.*, 1 Bush (Ky.), 139; *Elkins v. State*, 2 Humph. [Tenn.] 543); and what was not a nuisance at first, may, after a lapse of time, become such by increase of population in the neighborhood. *Com. v. Vansickle*, Brightly (Penn.), 69; *Douglass v. State*, 4 Wis. 387. So, it is no defense to a prosecution for nuisance to set up collateral benefits arising to the community (*Caldwell's Case*, 1 Dall. 150; *Com. v. Vansickle*, Brightly [Penn.], 69; *Com. v. Belding*, 13 Metc. [Mass.] 10); or that similar nuisances have been tolerated (*Douglass v. State*, 4 Wis. 387); or that the defendant was previously acquitted or convicted of maintaining the same nuisance. *People v. Townsend*, 3 Hill, 479; *Beckwith v. Griswold*, 29 Barb. 291. Nor is a license from government to do a certain thing any defense to such prosecution, if the work is performed in such a careless or negligent manner as to become a nuisance. *State v. Buckley*, 5 Harr. (Del.) 508; *State v. Mullikin*, 8 Blackf. (Ind.) 260; *Del. Canal Co. v. Com.*, 60 Penn. St. 367. See *Com. v. Kidder*, 107 Mass. 188; *Com. v. Reed*, 10 Casey (Penn.), 275; *People v. N. Y. Gas-light Co.*, 64 Barb. 55.

Nuisance at the common law is misdemeanor, in distinction from felony; and it follows that all who are concerned in maintaining the nuisance, whether agents or organizers, are principals. See *Com. v. Kimball*, 105 Mass. 465; *Lowenstein v. People*, 54 Barb. 299; *State v. Bell*, 5 Port. (Ala.) 366; *Com. v. Major*, 6 Dana (Ky.), 293; *Com. v. Nichols*, 10 Metc. (Mass.) 259; *State v. Matthias*, 1 Hill (S. C.), 87.

(684) Any obstruction of a public road or street, in such a way as to materially interfere with the public convenience, is indictable as a nuisance. *Com. v. Gowen*, 7 Mass. 378; *State v. Knott*, 2 Speer (S. C.), 692; *People v. Cunningham*, 1 Denio, 524; *State v. Moore*, 81 Conn. 479; *Bell v. State*, 1 Swan. (Tenn.) 42. But no indictment lies for obstructing a private road. *Drake v. Rogers*, 3 Hill, 604; *People v. Jackson*, 7 Mich. 432.

It is likewise an indictable nuisance to obstruct the passage of a navigable river by bridges or otherwise. *State v. Freeport*, 43 Me. 198; *Penna. v. Wheeling*, 18 How. (U. S.) 518; *State*

or dangerous to pass, either positively, by actual constructions (*n*), or negatively, by want of reparations. For both of these, * the person so [* 197] obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last) the parish at large, may be indicted, distrained to repair and amend them, and in some cases fined (*o*).

2. Offensive trades and manufactures, which when detrimental to the public, are indictable (*p*), and subject the party erecting or continuing the nuisance to fine according to the nature of the misdemeanor: such a nuisance can only be defined as above in general terms, and the true character of the act complained of must in each case be determined upon the evidence in accordance with principles analogous to those which have been already specified in relation to a private and merely actionable nuisance (*q*): negligently to blast stone in a quarry adjoining a highway, and thus to cause danger to the public, would clearly be indictable (*r*). And an indictment for a nuisance might lie against the owner of works carried on for his profit, although the nuisance was caused by the acts of the defendant's workmen, done in carrying on the works without his knowledge, and contrary to his general orders (*s*).

In accordance with the rule that an act done *ad commune nocumentum* is indictable, it has been held that to manufacture or to keep in large quantities in towns or closely inhabited places gunpowder or other dangerous, ignitable [* 198] and explosive substances, is so by the common * law (*t*). And for a like reason would it be so to convey an inflammable and dangerous substance on board ship (*u*), or to manufacture fireworks to the peril of the queen's subjects (*x*). With a view, however, to repressing the nuisances just specified, the legislature has, by various recent enactments efficiently provided (*y*).

Also by the statute 24 & 25 Vict. c. 100, (which concerns offences against the person,) any one who shall knowingly have in his possession, or make or manufacture any gunpowder, explosive substance, or any dangerous or noxious

(*n*) *Reg. v. Train*, 2 B. & S. 640.

(*o*) Where a house has been erected, or an inclosure made, upon any part of the demesnes of the crown, or of a highway, or common street, or public water, or such like public things, it is properly called a "purpresture," from the French *purpris*, an inclosure. Co. Litt. 277.

(*p*) The principal statute for the repression of nuisances, such as above adverted to, is "The Sanitary Act, 1866" (29 & 30 Vict. c. 90), amending the 28 & 29 Vict. c. 75; 28 & 24 Vict. c. 77; 18 & 19 Vict. c. 121; and the 6 Geo. 4, c. 78 (concerning quarantine).

(*q*) *Ante*, vol. iii. *St. Helen's Smelting Company v. Tipping*, 11 H. L. Cas. 643; *R. v. White*, 1 Burr. 838; *R. v. Moore*, 8 B. & Ald. 184; *Reg. v. Betts*, 16 Q. B. 1023, 1088.

(*r*) *Reg. v. Mutters*, L. & C. 491.

(*s*) *Reg. v. Stephens*, 1 L. R. Q. B. 703.

(*t*) *Reg. v. Lister*, Dearl. & B. 209, 237.

(*u*) *Williams v. East India Company*, 8 East, 192, 201.

(*x*) *Reg. v. Bennett*, Bell C. C. 1.

(*y*) The principal act concerning the making, keeping, and carriage of gunpowder and compositions of an explosive nature, and concerning the manufacture, sale, and use of fireworks, is the 23 & 24 Vict. c. 139, which has been amended by the 25 & 26 Vict. c. 98, and the 24 & 25 Vict. c. 180.

The carrying and depositing of goods which are deemed to be "specially dangerous" within the meaning of the stat 29 & 30 Vict. c. 69, or which may be declared to be so by order in council under s. 3 of that enactment, are regulated by its provisions.

v. Dibble, 4 Jones (N. C.), 107; *Moore v. Sanborn*, 3 Mich. 219. But the soil between high and low-water mark may be leased by the owner for private purposes, provided such use does not interfere with the navigation of the river. *Zug v. Com.*, 70 Penn. St. 138.

A person or corporation who undertakes to repair a road or cleanse the channel of a river is indictable for a nuisance arising from the neglect to perform such duty. *State v. Commissioner*, 1 Walker (Miss.), 969; *State v. King*, 3 Ired. (N. C.) 411; *People v. Corporation of Albany*, 11 Wend. 589.

thing, or any machine, engine, instrument, or thing, with intent by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in the act mentioned, shall be guilty of a misdemeanor (z).

Such are acts deemed by our law to be criminal as prejudicial to the health and safety of the community. (685)

Secondly, Offences against public morals and economy. 2ndly. Amongst offences which especially affect the common-wealth, and fall consequently within the limits of this chapter, are those against the public morals and economy.

* The individuals of the state, like members of a well-governed family, [*199] are bound to conform their general behaviour to the rules of propriety, decorum and good manners; and to be decent, industrious, and inoffensive in their respective stations. The class of offences before us is accordingly somewhat miscellaneous, comprising all such crimes as especially affect public society, and the domestic order of the kingdom, and are not comprehended under any of the preceding species.

I. Offences relating to marriage will be first noticed; they are as under:

1. Any person who, falsely pretending to be in holy orders, solemnizes matrimony according to the rites of the Church of England, and knowingly and wilfully so offends, is guilty of felony (a).

2. By the 6 & 7 Will. 4, c. 85 (b), which allows marriages to be solemnized in dissenting places of worship, certified according to law, and registered as therein directed, or before the superintendent registrar of the district, (ss. 18, 21,) it is declared (s. 39) to be felony knowingly and wilfully to solemnize any marriage, except by special licence, in any other place than a church or chapel in which marriages may be solemnized, according to the rites of the Church of England, or than the registered building or office specified in the notice and certificate given according to that act, or knowingly to solemnize any marriage in any such registered building or office, in the absence of a registrar of the district; or to solemnize any marriage, except by licence, within twenty-one days after the entry of the notice to the superintendent registrar, as required by the act; or, if the marriage is by licence, within seven days of such entry, or after three calendar months after such entry. And by the 40th section * of the above statute any superintendent registrar [*200] unduly issuing a certificate for marriage is also declared guilty of felony (c).

(e) S. 64. Punishment: imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

By s. 65, a justice of the peace may issue a warrant for searching any house in which explosive substances are suspected to be made

for the purpose of committing felonies against the above act.

(a) 4 Geo. 4, c. 76, s. 21. Punishment: penal servitude for fourteen, or not less than five years.

(b) See also 28 & 24 Vict. c. 18.

(c) Punishment: penal servitude for seven years, or imprisonment for not more than two years. See 7 & 8 Geo. 4, c. 28, s. 8.

(685) The careless or negligent keeping of gunpowder or other explosive compounds in large quantities, near dwelling-houses, or where the lives of persons are thereby endangered, is indictable. *Bradley v. People*, 56 Barb. 72; *People v. Sands*, 1 Johns. 78; *Cheatham v. Shearon*, 1 Swan. (Tenn.) 218. And licenses to keep or manufacture such compounds are to be strictly construed. See *Com. v. Kidder*, 107 Mass. 188; *Del. Canal Co. v. Com.*, 6 Penn. St. 367; *State v. Mullikin*, 8 Blackf. (Ind.) 260.

3. Whosoever shall forge or fraudulently alter any licence of or certificate for marriage, or shall utter, dispose of, or put off any such licence or certificate, knowing the same to be forged or fraudulently altered (*d*); or shall unlawfully destroy, or injure any register of marriages, which is by law authorised or required to be kept, or any certified copy of such register, or shall forge or fraudulently alter in any such register any entry relating to any marriage, or shall knowingly and unlawfully insert in any such register, any false entry of any matter relating to any marriage, or shall knowingly and unlawfully give any false certificate relating to any marriage, or shall forge or counterfeit the seal of any register office, or shall utter, dispose of, or put off any such register, entry, certificate, or seal, knowing the same to be false, forged or altered (*e*); or shall knowingly and wilfully insert in any copy of any register, transmitted to the registrar or other officer any false entry of any matter relating to any marriage, or shall forge or alter, or utter, dispose of, or put off, knowing the same to be forged or altered, any copy of any register so transmitted, or shall knowingly and wilfully sign or verify any false copy of any such register, or shall unlawfully destroy, or injure, or shall for any fraudulent purpose take from its place of deposit, or conceal, any such copy of any register,—shall be guilty of felony (*f*).

[* 201] * 4. Another felonious offence, with regard to the estate of matrimony, is bigamy, which properly signifies being twice married. A second marriage, living the former husband or wife, is simply void, and a mere nullity, by the ecclesiastical law of England: and yet the legislature has thought fit to make it felony, by reason of its being so great a violation of the public economy and decency of a well-ordered state. Polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations, the fallaciousness of which has been fully proved by many sensible writers: but in northern countries the very nature of the climate seems to reclaim against it; it never having obtained in this part of the world, even from the time of our German ancestors, who, as Tacitus informs us, "*prope soli barbarorum singulis uxoribus contenti sunt.*" And with us in England it is enacted by statute 24 & 25 Vict. c. 100, s. 57, that whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere, shall be guilty of felony; and any such offender may be tried in any place in England, where he shall be apprehended or be in custody, in the same manner in all respects as if the offence had been actually committed there (*g*): but this enactment does not extend (1) to any second marriage contracted elsewhere than in England or Ireland by any other than a subject of her majesty, or (2) to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such

(*d*) 24 & 25 Vict. c. 98, s. 85. Punishment: penal servitude for not more than seven years, nor less than five years; or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(*e*) 24 & 25 Vict. c. 98, s. 86.

(*f*) Id. s. 87. Punishment for any one of the offences *supra*: penal servitude for life,

or for any term not less than five years; or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(*g*) Punishment: penal servitude for not more than seven years, nor less than five years; or imprisonment for any term not exceeding two years, with or without hard labour.

person to be living within that time (*h*), or (3) to any * person who, [* 202] at the time of such second marriage, shall have been divorced from the bond of the first marriage, or (4) to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction (*i*).

II. The next offence to be mentioned more immediately against morality, and cognizable by the temporal courts, is that of public indecency, which is indictable as a misdemeanor (*k*). The selling an obscene print, or exposing it for sale, is thus indictable (*l*), and for such offence a punishment has been assigned by statute (*m*). (686)

In the year 1650, when the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, not only incest and wilful adultery were made capital crimes; but also the repeated act of keeping a brothel, or committing fornication, were (upon second conviction) made felony without benefit of clergy (*n*). But at the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the spiritual court, according to the rules of the canon law; a law which has treated the offence of incontinence, nay, even adultery itself, with a great degree of tenderness and lenity; owing perhaps to the * constrained celibacy of its first compilers. The temporal courts do [* 203] not punish adultery as criminal (*o*). (687)

(*h*) See *Reg. v. Cullen*, 9 Car. & P. 681; *Reg. v. Curgervon*, 1 L. R. C. C. 1.

(*i*) In the *Duchess of Kingston's case*, the judges were unanimously of opinion that a sentence in a spiritual court against a marriage, in a suit of jactitation of marriage is not conclusive evidence, so as to estop the counsel for the crown from proving the marriage in an indictment for bigamy. And that admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion. 20 St. Tr. 855.

(*k*) See *R. v. Sedley*, 2 Stra. 791; *Reg. v. Elliot*, L. & C. 108.

(*l*) See *Dugdale v. Reg.*, Dears. 64; 20 & 21 Vict. c. 83; *post*, p. 205.

(*m*) 14 & 15 Vict. c. 100, s. 29. See also 1 & 2 Vict. c. 88, s. 2.

(*n*) Scobell, 121.

(*o*) A conspiracy to procure the defilement of a girl (*Reg. v. Mears*, 2 Den. 79; *R. v. Lord Grey*, 9 St. Tr. 127), or to induce a woman to become a common prostitute (*Reg. v. Howell*, 4 F. & F. 160), is indictable. See also 24 & 25 Vict. c. 100, s. 49.

(686) See *Willis v. Warren*, 1 Hilton, 590. It is held that the exhibition of an obscene print need not be public to be indictable. (*Com. v. Sharpless*, 2 Serg. & R. (Penn.) 91.

The term "public indecency" has no fixed legal meaning, is vague and indefinite, and cannot in itself imply a definite offense. And hence the courts, by a kind of judicial legislation, in England and the United States, have usually limited the operation of the term to public displays of the naked person; the publication, sale, or exhibition of obscene books and prints; or the exhibition of a monster,—acts which have a direct bearing on public morals, and affect the body of society. *McJunkins v. State*, 10 Ind. 140, 145. And see *Knowles v. State*, 8 Day (Conn.), 108; *Com. v. Holmes*, 17 Mass. 336; *Bell v. State*, 1 Swan. (Tenn.) 42; *Britain v. State*, 8 Humph. (Tenn.) 208; *State v. Roper*, 1 Dev. & Bat. (N. C.) 208; *State v. Rose*, 82 Mo. 560; *Miller v. People*, 5 Barb. 203. See Laws N. Y. 1868, ch. 430; Laws 1873, ch. 747; Laws 1873, ch. 777; 7 Edm. Stat. 309; 9 id. 468, 770.

(687) Fornication and adultery, where they are open, gross and notorious, may amount to a public nuisance, indictable at common law. *State v. Moore*, 1 Swan. (Tenn.) 136; *State v. Smith*, 32 Texas, 187. See *Com. v. Isaac*, 5 Rand. (Va.) 684; *Com. v. Jones*, 2 Gratt. (Va.) 555; *State v. Brunson*, 2 Bailey (S. C.), 149.

We may observe, however, that acts different in kind from the preceding, yet tending to outrage public decorum, may be punishable, *ex. gr.*, to remove, without lawful authority, a corpse (*p*), or to dispose of a dead body, without lawful authority, for the purpose of dissection, and for gain and profit (*q*). For any such act of indecency and indecorum, the offender may be punished either by an information granted by the court of Queen's Bench, or by an indictment preferred before a grand jury at the assizes or quarter sessions.

III. Drunkenness is punishable by the 21 Jac. 1, c. 7, s. 3, by a pecuniary penalty. And many wholesome statutes have from time to time been passed, which regulate the licensing of alehouses (*r*), and legalize or facilitate the suppression of gaming and betting houses, and bawdy houses (*s*), of which the first and last-mentioned are clearly nuisances at common law (*t*). (688)

(*p*) *Reg. v. Sharpe*, Dears. & B. 160.

(*q*) See *Reg. v. Feist*, Dears. & B. 590. A gaoler cannot legally detain the dead body of a prisoner who has died in his custody. *Reg. v. Fox*, 2 Q. B. 246; *Reg. v. Scott*, Id. 248.

(*r*) See Burn's Justice, tit. Alehouses.

(*s*) The statute 25 Geo. 2, c. 36, s. 8, reciting that "by reason of the many subtle and crafty contrivances of persons keeping bawdy-houses, gaming-houses, or other disorderly houses, it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment;" enacts that "any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof."

The 8 & 9 Vict. c. 109, s. 2, further enacts that, "in default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favourable to all

the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet; and every such house or place shall be deemed a common gaming-house, such as is contrary to law, and forbidden to be kept by the 33 Hen. 8, c. 9, and by all other acts containing any provision against unlawful gaming and gaming-houses." And by s. 17 of the above-cited statute, "every person who shall by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person, to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly."

See also 17 & 18 Vict. c. 38, s. 2; 22 & 23 Vict. c. 17; and (as to betting-houses) 16 & 17 Vict. c. 119.

As to the punishment for keeping a common gambling-house, a common bawdy-house or a common ill-governed and disorderly house, see 3 Geo. 4, c. 114.

(*t*) Hawk. P. C. bk. 1, c. 74, s. 6; *R. v. Rogier*, 1 B. & C. 272. A conspiracy to cheat is indictable. *Reg. v. Hudson*, Bell, C. C. 263.

(688) Mere private intoxication is not an indictable offense at common law. *State v. Waller*, 8 Murph. (N. C.) 229; *State v. Deberry*, 5 Ired. (N. C.) 871; *O'Hanlon v. Myers*, 10 Rich. (S. C.) 128. But common drunkenness, where of such a character as to habitually shock, molest and disturb the community, may be treated as a public nuisance. See *Com. v. Boon*, 2 Gray (Mass.), 74; *State v. Waller*, 8 Murph. (N. C.) 229; *Smith v. The State*, 1 Humph. (Tenn.) 896; *Hutchison v. The State*, 5 id. 142.

A disorderly house, kept in such a way as to disturb the public generally, or the inhabitants of a particular neighborhood, is an indictable nuisance at common law. See *State v. Purse*, 4 McCord (S. C.), 472; *State v. Matthews*, 2 Dev. & Bat. (N. C.) 424; *Hackney v. State*, 8 Ind. 494; *Clementine v. State*, 14 Mo. 112; *Hunter v. Com.*, 2 Serg. & R. (Penn.) 298;

IV. Idleness and vagrancy are justly deemed to be offences against the public order and economy, and are in some cases punishable. Under the statute

iv. Idleness and 5 Geo. 4, c. 83 (amended by the 1 & 2 Vict. c. 38, and by 31 & vagrancy. 32 Vict. c. 52, and 32 & 33 Vict. c. 99, s. 9), such offenders are (s. 3) thus classified:—

1. An idle and disorderly person is: (1) Any person being able wholly or in part to maintain himself or his family by any means, who refuses or neglects so to do, whereby he or his family, whom he may be bound to maintain, becomes chargeable to the parish. (2) Any person returning to * and becoming chargeable in any parish, from whence he shall have been [*205] removed by order of two justices of the peace, unless he produce a certificate of settlement in such other parish, &c. (3) Petty chapmen or pedlars wandering abroad and trading, without being duly licensed or otherwise authorised by law. (4) Common prostitutes, wandering in the public streets or public highways, or in any public place of resort, and behaving in a riotous or indecent manner (u). (5) Persons wandering abroad, or placing themselves in any public place, street, highway, court, or passage, to beg or gather alms, or causing, or procuring, or encouraging any child so to do.

These offenders are by the above act punishable by a single justice, with one month's imprisonment and hard labour.

2. Rogues and vagabonds are, by sect. 4: (1) Persons committing any of the offences before mentioned, after having been convicted as idle and disorderly persons. (2) Persons pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of her Majesty's subjects. (3) Persons wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any

(u) See per Bramwell, B. *Reg. v. Howell*, 4 F. & F. 164.

State v. Stevens, 40 Me. 559. A house may be disorderly, although the disorder extends to but one room (*State v. Gentry*, 46 N. H. 61); or, instead of being within the house, is carried on outside and around it. *State v. Webb*, 25 Iowa, 235; see *State v. Matthews*, 2 Dev. & Bat. (N. C.) 424. And to be indictable as disorderly, the house need not be kept for lucre. *State v. Williams*, 1 Vroom (N. J.), 102; *State v. Bailey*, 1 Fost. (N. H.) 843.

A mere tippling-house is not *per se* a nuisance at common law. *Com. v. McDonough*, 18 Allen (Mass.), 581. But if one keeps a house or shop for promiscuous and noisy tippling, thereby promoting drunkenness in a community, he may be indicted (*Smith v. Com.*, 6 B. Monr. [Ky.] 21; *State v. Bertheol*, 6 Blackf. [Ind.] 474; *Wilson v. Com.*, 12 B. Monr. [Ky.] 2; *State v. Burchinal*, 4 Harr. [Del.] 572; *U. S. v. Columbus*, 5 Cranch's C. C. 304; *U. S. v. Benner*, id. 347); and such a house is not protected by a license to sell liquors therein. *United States v. Elder*, 4 Cranch's C. C. 507; *State v. Mullikin*, 8 Blackf. (Ind.) 260; *State v. Buckley*, 5 Harr. (Del.) 508. So, a house of ill-fame, or bawdy house where promiscuous, illicit, sexual intercourse is encouraged, is an indictable nuisance at common law. *State v. Evans*, 5 Ired. (N. C.) 603; see *Com. v. Lewis*, 1 Metc. (Mass.) 151; *State v. Bentz*, 11 Mo. 27; *Com. v. Wood*, 97 Mass. 225.

It is not an indictable offense to merely permit a single act of gaming in one's house. *Estes v. State*, 2 Humph. (Tenn.) 496. But common gaming houses, like other disorderly houses, may be treated as public nuisances, at the common law. *State v. Layman*, 5 Haring. (Del.) 510; *People v. Jackson*, 3 Denio, 101; *State v. Haines*, 30 Me. 65; *Vandervoort v. State*, 8 Eng. (Ark.) 700; *State v. Doon*, R. M. Charl. (Ga.) 1; *Lord v. State*, 16 N. H. 325; *Com. v. Stahl*, 7 Allen (Mass.), 304; see *Armstrong v. State*, 4 Blackf. (Ind.) 247; *Rice v. State*, 10 Texas, 545; *Lockhart v. The State*, id. 275; *Barada v. The State*, 13 Mo. 94.

visible means of subsistence, and not giving a good account of themselves. (4) Persons wilfully exposing to view in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition (x). (5) Persons wilfully, openly, lewdly, and obscenely exposing their persons in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female (y). (6) Persons wandering abroad [* 206] and *endeavouring, by exposure of wounds or deformities, to obtain alms (z). (7) Persons going about as collectors of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence. (8) Persons running away and leaving their wives or children chargeable, or whereby they shall become chargeable to the parish. (9) Persons playing or betting in any street, highway, or other open and public place, at or with any table or instrument of gaming, at any game or pretended game of chance. (10) Persons having in their custody any pick-lock key, or other implement, with intent feloniously to break into any dwelling-house, warehouse, or out-building, or being armed with any gun, or offensive weapon, or having upon them any instrument, with intent to commit any felonious act (a). (11) Persons being found in or upon any dwelling-house, warehouse, or out-house, or in any enclosed yard, garden, or area, for any unlawful purpose (b). (12) Suspected persons, or reputed thieves, frequenting any river, canal, or navigable stream, dock, quay, wharf, or warehouse, near or adjoining thereto, or any street or highway leading thereto, or any place of public resort, or any street, highway, or place adjacent, with intent to commit felony. (13) And every person apprehended as an idle and disorderly person, [* 207] and *violently resisting any constable or other peace officer so apprehending him, and being subsequently convicted of the offence for which he shall have been so apprehended.

Such offenders are, by the same act, punishable by a single magistrate, with three calendar months' imprisonment and hard labour.

3. Incurrable rogues are, by sect. 5: (1) Persons breaking or escaping out of any place of legal confinement before the expiration of the term for which they have been committed, or ordered to be confined by virtue of the act. (2) Persons committing any offence against the act which shall subject them to be dealt with as rogues and vagabonds, such persons having been at some former time adjudged so to be and duly convicted thereof. (3) And every person apprehended as a rogue and vagabond, and violently resisting any constable or other peace officer so apprehending him, and being subsequently convicted of the offence for which he shall have been so apprehended.

Such offenders are to be committed to the next sessions, and kept to hard

(x) The exposing of obscene prints in a shop window is declared to be within this clause by the stat. 1 & 2 Vict. c. 38, s. 2. *Ante*, p. 202.

(y) A public exposure of the person is indictable. See *Reg. v. Thallman*, L. & C. 326; *Reg. v. Webb*, 1 Den. 338.

(z) See 1 & 2 Vict. c. 38.

(a) See 24 & 25 Vict. c. 96, ss. 58, 59.

(b) Under the Larceny Act (24 & 25 Vict. c. 96, s. 104), "any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering, in any highway, yard, or other place, during

the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony against the act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law."

The stat. 24 & 25 Vict. c. 97 (concerning malicious injuries to property) contains a like provision (s. 57); and the 24 & 25 Vict. c. 100 (concerning offences against the person) similarly provides (s. 66), in respect of persons suspected "of having committed, or being about to commit, any felony" in that act mentioned.

labour in the interim; and the sessions may further punish them by imprisonment with hard labour for one year, together with whipping, if not females (c). (689)

V. Lastly, the refusal, without lawful excuse, to * execute a public [* 208]
office, as that of constable or overseer of the poor, is indictable at com-
mon law (d), and seems properly referable to the class of offences
under our notice, being in contravention of public order and
economy. (690)

V. Refusal to
execute a pub-
lic office.

* CHAPTER XIII.

[* 209]

OFFENCES AGAINST THE PERSON.

IN the eight preceding chapters we have considered, first, such crimes as are more immediately injurious to God, and religion; secondly, such as violate or transgress the law of nations; thirdly, such as more especially affect the sovereign; fourthly, such as more directly infringe the rights of the public or commonwealth, taken in its collective capacity; we are now, lastly, to take into consideration those crimes which in a more peculiar manner affect and injure individuals or private subjects.

Were these injuries, indeed, confined to individuals, they would fall under the notion of private wrongs; for which a satisfaction would be due only to the party injured. But the wrongs which we are now to treat of affect the entire community. 1. Because they cannot in general be committed without a violation of the laws of nature; of the moral as well as political rules of right. 2. Because they include in them almost always a breach of the public peace, or else the ingredient of malice, or of fraud affecting the public. 3. Because by their example and evil tendency they threaten and endanger the subversion of all civil society. Upon these accounts it is, that besides any private satis-

(c) By the 6th section of the act, any person may apprehend offenders against it; and a penalty is enforced on constables neglecting their duty; see also sect. 11. By the 7th section, justices may issue their warrants to apprehend suspected offenders. By the 8th section, all vagrants are to be searched, and their trunks and bundles, &c., to be inspected; and by sect. 13, lodging-houses, &c., suspected

to conceal vagrants may be searched, and suspected persons brought before a justice. By the 9th section, justices may bind persons by recognizance to prosecute vagrants at sessions, and a power is given to sessions to order payment of expenses to prosecutors and witnesses, &c.; and see sect. 21.

(d) *R. v. Adlard*, 4 B. & C. 773; *R. v. Mosley*, 3 Ad. & E. 488; *R. v. Fearnley*, 1 T. R. 816.

(689) Statutes, similar to the English statute cited in the text, and providing for the punishment of the same class of offenders, have been adopted in the United States, and have frequently been held constitutional. See *People v. Gray*, 4 Park. 616; *People v. Forbes*, id. 411; *People v. Phillips*, 1 id. 95; *State v. Macey*, 1 McMull. (S. C.) 501.

(690) See *State v. McIntyre*, 3 Ired. (N. C.) 171; *State v. Lisbon*, 9 Humph. (Tenn.) 608; *Com. v. Silbee*, 9 Mass. 417; *State v. Hoit*, 3 Fost. (N. H.) 355. The refusal to accept an office is a crime which an inhabitant of the United States was never known to commit. See 2 Bish. Crim. Proc., § 820.

faction due and given to the individual injured by action for the private wrong, the government also calls upon the offender to submit to punishment for the public crime. And the prosecution of these offences is at the suit and in the name of the sovereign, in whom, by the texture of our constitution, [*210] * the executory power of the law entirely resides. Thus, too, in the old Gothic constitution, there was a threefold punishment inflicted on a delinquent: first, for the private wrong to the party injured; secondly, for the offence against the king by disobedience to the laws; and thirdly, for the crime against the public by his evil example (a). Of which we may trace the groundwork, in what Tacitus tells us of his Germans (b); that, whenever offenders were fined, "*pars mulctæ regi, vel civitati, pars ipsi qui vindicatur vel propinquis ejus, exsolvitur.*"

Offences against private subjects are principally of two kinds (c); first, against their persons; secondly, against their property.

I. Of crimes injurious to the persons of private subjects, the most principal and important is the offence of taking away life, which is the immediate gift of the Creator; and of which therefore no man can be entitled to deprive himself or another, but in some manner either expressly commanded in, or evidently deducible from those laws which the Creator has given us; the divine laws of either nature or revelation. The subject, therefore, in the present chapter first to be considered will be the offence of homicide, or destroying the life of man, the particular circumstances of mitigation or aggravation which attend it, and the punishment of this offence.

Homicide, or the killing of any human creature, is by our customary law, 1. justifiable; 2. excusable; or, 3. felonious; and although, as presently stated, the last-mentioned only of these three species of homicide is now indictable and punishable, a few remarks as to each of the two former, may with a view to rendering intelligible the nature of felonious homicide be proper.

1. Justifiable homicide is of divers kinds.

[*211] * (1.) Such as is owing to some unavoidable necessity, without any will, intention, or desire, and without any inadvertence or negligence

I. Justifiable. in the party killing, and therefore without any shadow of blame. (1.) Of necessity As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who has forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law requires it. But the law must require it, otherwise it is not justifiable: therefore, wantonly to kill the greatest of malefactors, a felon, or a traitor, attainted, or outlawed, deliberately, uncompelled, and extrajudicially, is murder (d). For, as Bracton (e), very justly observes, "*istud homicidium, si fit ex livore, vel delectatione effundendi humanum sanguinem, licet juste occidatur iste, tamen occisor peccat mortaliter, propter intentionem corruptam.*" And further, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of mur-

(a) Stiernhook, l. 1, c. 5.

(b) De Mor. Germ. c. 12.

(c) As to the offence of libel directed

against the reputation of an individual, ante, p. 178.

(d) 1 Hale, P. C. 497.

(e) Fol. 120.

der (*f*). And upon this account Sir Matthew Hale, though he accepted the place of a judge of the Common Pleas under Cromwell's government, yet declined to sit on the crown side at the assizes, and try prisoners; having strong objections to the legality of the Protector's commission (*g*); a distinction, perhaps, rather too refined; since the punishment of crimes is at least as necessary to society, as maintaining the boundaries of property. Also such judgment, when legal, must be executed by the proper officer, or his appointed deputy; for no one else is required by law to do it; which requisition it is, that justifies the homicide. If another person does it of his own head, it is held to be murder (*h*); even though it be the judge himself (*i*). It * must further be executed, *servato juris ordine*; it must pursue the [* 212] sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versa*, it is murder (*k*): for the officer is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law: but if a sheriff changes one kind of death for another, he then acts by his own authority, which extends not to the commission of homicide, and besides, this license might occasion a very gross abuse of his power. (691)

(2.) Again; in some cases homicide is justifiable, rather by the permission, than by the absolute command of the law, either for the advancement of public justice, which without such indemnification would never be carried on with proper vigour: or, where it is committed for the prevention of some atrocious crime, which cannot otherwise be avoided.

Homicide committed for the advancement of public justice, is, where an officer, in the execution of his office, either in a civil or criminal case, kills a person who assaults and resists him (*l*); or where an officer, or any private person, attempts to take a man charged with felony, and is resisted; and, in the endeavour to take him, kills him (*m*). This is similar to the old Gothic constitutions, which (Stiernhook informs us (*n*)) "*furem, si aliter capi non posset, occidere permittunt.*" In case of a riot, or rebellious assembling, the officers endeavouring to disperse the mob are justifiable in killing them, both at common law (*o*), and by the Riot Act, 1 Geo. 1, c. 5 (*p*). Where the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he in his defence kills any of them, it is justifiable for the sake of preventing an escape (*q*). But, in * all these cases, there must be an apparent necessity on the officer's side; viz. that the person could not be [* 213] arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, unless such homicide were committed: otherwise, without such absolute necessity, it is not justifiable. (692)

(*f*) 1 Hawk. P. C. 70; 1 Hale, P. C. 497.

(*g*) Burnet in his Life.

(*h*) 1 Hale, P. C. 501; 1 Hawk. P. C. 70.

(*i*) Dalt. Just. c. 150.

(*k*) Finch, L. 31; 3 Inst. 52; 1 Hale, P. C. 501.

(*l*) 1 Hale, P. C. 494; 1 Hawk. P. C. 71.

(*m*) 1 Hale, P. C. 494.

(*n*) De Jure Goth. l. 8, c. 5.

(*o*) 1 Hale, P. C. 495; 1 Hawk. P. C. 161.

(*p*) *Ante*, p. 164.

(*q*) 1 Hale, P. C. 496.

(691) The malicious killing of an alien enemy, not in the exercise of war, is murder. *State v. Gut*, 13 Minn. 341.

(692) Where no process has been issued, a homicide can only be justified, even by an officer, by showing the actual commission of a felony, and that there was a positive necessity to take life in order to arrest or detain the felon. *Conraddy v. The People*, 5 Park. 234.

(3.) In the next place, homicide committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature (*r*); and also by the law of England, as it stood so early as the time of Bracton (*s*), and as it was declared by statute 24 Hen. 8, c. 5. If any person attempts a robbery or murder of another, or attempts to break open a house, in the night time (which extends also to an attempt to burn it (*t*)), and be killed in such attempt, the slayer shall be acquitted and discharged (*u*). This reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any house in the day time, unless it carries with it an attempt of robbery also. So the Jewish law, which punished no theft with death, makes homicide only justifiable in case of nocturnal house-breaking; "if a thief be found breaking up, and he be smitten that he die, no blood shall be shed for him: but if the sun be risen upon him, then shall blood be shed for him; for he should have made full restitution (*x*)."^{*} At Athens, any theft was committed by night, it was lawful to kill the criminal, if taken in the fact (*y*): and by the Roman law of the twelve tables, a thief might be slain by night with impunity: or even by day, if he armed himself with any dangerous weapon (*z*): which amounts very nearly * to the same as is permitted by our own constitution (*a*).

The Roman law also justified homicide, when committed in defence of the chastity either of one's self or relations (*b*): and so also, according to Selden (*c*), stood the law in the Jewish republic. The English law likewise justifies a woman killing one who attempts to ravish her (*d*): and so too the husband or father may justify killing a man, who attempts a rape upon his wife or daughter: but not if he takes a man in adultery by consent, for the one is forcible and felonious, but not the other (*e*). And doubtless the forcibly attempting a crime of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor (*f*). (693)

(*r*) Puff. L. of N. 1, 2, c. 5.

(*s*) Fol. 155.

(*t*) 1 Hale, P. C. 488.

(*u*) We read also that, if thieves come to a man's house to rob or murder him, and the owner or his servants kill any of the thieves in defence of himself and his house, this is not felony. *Semayne's Case*, 5 Rep. 91; 1st Resolution.

(*x*) Exod. xxii. 2.

(*y*) Potter. Antiq. b. 1, c. 24.

(*z*) Cic. pro Milone, 8; Dig. 9, 2, 4.

(*a*) See also the Code Penal of France, lib. iii. tit. 2, ss. 322, 326, 329.

(*b*) "*Divus Hadrianus rescripsit, eum qui stuprum sibi vel suis inferentem occidit, dimittendum.*" Dig. 48, 8, 1.

(*c*) De Leg. Hebraeor. l. 4, c. 8.

(*d*) Bac. Elem. 84; 1 Hawk. P. C. 71.

(*e*) 1 Hale, P. C. 485, 486.

(*f*) See *Reg. v. Fisher*, 8 C. & P. 182.

In civil cases, the rule is stated to be that, so long as a party liable to arrest endeavors peaceably to avoid it, he may not be killed; but whenever, by his conduct, he puts in jeopardy the life of any attempting to arrest him, he may be killed, and the act will be excusable. *State v. Anderson*, 1 Hill (S. C.), 327; 2 Whart. Crim. Law, § 1032.

(693) A person should not needlessly kill another, instead of arresting him, though the offender be found in the commission of a felony. *Gardiner v. Thibodeau*, 14 La. Ann. 732. But, if an officer attempts to arrest the offender in such case, and he runs away, the officer is justified in shooting at him to compel him to stop. See *Brady v. Price*, 19 Texas, 285; *State v. Roane*, 2 Dev. (N. C.) 58; *Dill v. State*, 25 Ala. 15. It is otherwise, however, if the offense is a misdemeanor. *Id.*; *Conraddy v. The People*, 5 Park. 234.

Where a known felony is attempted upon the person, be it to rob, or murder, or ravish, the party assaulted may repel force by force, and even his servant attendant on him, or any other person present, may interpose for preventing mischief, and if death ensue, the party so interposing will be justified. *Com. v. Daley*, 4 Penn. Law Jour. 153; 2 Whart.

In these instances of justifiable homicide, it may be observed that the slayer is in no kind of fault whatsoever, not even in the minutest degree; he is indeed deserving of commendation rather than of blame.

2. Excusable homicide is of two sorts: either *per infortunium*, by misadventure; or *se defendendo*, upon a principle of self-preservation. We will first see

2. Excusable Homicide. wherein these two species of homicide are distinct, and then wherein they agree.

(1.) Homicide *per infortunium* or misadventure, is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another; as (1.) Homicide by misadventure. where a man is at work with a hatchet, and the head thereof flies off, and kills a stander-by; or where a person shooting at a mark, in a place fit and proper for the purpose, undesignedly and without negligence, kills a man (g): for the act is lawful * and the effect is merely accidental. So where a parent is moderately correcting his child, a mas- [* 215] ter his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure; for the act of correction is lawful: but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) may be murder (h); for immoderate correction is unlawful. Thus, by an edict of the Emperor Constantine (i), when the rigour of the Roman law with regard to slaves began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment, and, if death accidentally ensued, he was guilty of no crime: but if he struck him with a club or a stone, and thereby occasioned his death; or if in any other yet grosser manner, "*immoderatè suo jure utatur, tunc reus homicidii sit.*"

But to proceed. A tilt or tournament, the martial diversion of our ancestors, was an unlawful act: and so are boxing and sword-playing (k), the succeeding amusements of their posterity: therefore, if a principal, whilst engaged in such contention, chance to kill his opponent, he will be guilty of manslaughter. Likewise to whip another's horse, whereby he runs over a child and kills it, may render the person who whipped the horse guilty of manslaughter, for the act was a trespass, and at best a piece of mischief, of inevitably dangerous consequence (l). And in general, if death ensues in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, in such and similar cases, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts (m).

* (2.) Homicide in self-defence, or *se defendendo*, upon a sudden affray, is excusable by the English law. This species of self-defence [* 216]

(2.) Homicide in self-defence. must be distinguished from that just now mentioned, as calculated to hinder the perpetration of a crime: which is not only a

(g) 1 Hawk. P. C. 73, 74.

(h) 1 Hale, P. C. 473, 474.

(i) Cod. l. 9, t. 14.

(k) *Hunt v. Bell*, 1 Bing. 1.

(l) 1 Hawk. P. C. 73.

(m) *Ibid.* 74; 1 Hale, P. C. 472; Fost. 261.

Cr. Law, § 1019; see *Murphy v. People*, 37 Ill. 447; *People v. Campbell*, 30 Cal. 312; *State v. Burke*, 30 Iowa, 331; *State v. Benham*, 23 id. 154.

Where a house is assailed with intent to take life or inflict great bodily harm, the occupant may lawfully use such fatal means to protect himself and family as would be necessary if met by his assailant face to face in any other place. *State v. Patterson*, 45 Vt. 308; see *Evans v. State*, 4 Miss. 762; *U. S. v. Mingo*, 2 Curtis' C. C. 1.

matter of excuse, but of justification. But the self-defence which we are now speaking of, is that whereby a man may protect himself from an assault or the like, in the course of a sudden broil or quarrel, by killing the person who assaults him. And this is what the law expresses by the word chance-medley, or (as some rather choose to write it) chaud-medley, the former of which in its etymology signifies a casual affray, the latter an affray in the heat of blood or passion; both expressions being of pretty much the same import: but the former is in common speech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the statute 24 Hen. 8, c. 5, and our ancient books (n), that it is properly applicable to such killing as happens in self-defence upon a sudden rencontre (o). This right of natural defence does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant.

It is frequently difficult to distinguish this species of homicide (upon chance-medley in self-defence) from that of manslaughter, in the proper legal sense of the word (p).

But the true criterion for discriminating between them * seems to [* 217] be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter: but if the slayer has not begun to fight, or (having begun) endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence (q). For which reason the law requires, that the person, who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow-subjects the law countenances no such point of honour: because the sovereign and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves (r). In this the civil law agrees with ours, or perhaps goes rather further: "*qui cum aliter tueri se non possunt, damni culpam dederint, innoxii sunt*" (s). The party assaulted must therefore flee as far as he conveniently can, *i. e.*, until stopped by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him (t); for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice (u), as well as of the municipal law.

And, as the manner of the defence, so is also the time to be considered:

(n) Staunf. P. C. 16.

(o) 8 Inst. 55, 57; Fost. 275, 276.

(p) 8 Inst. 55. See *R. v. Annesley*, 17 St. Tr. 1094.

(q) Fost. 277.

(r) 1 Hale, P. C. 481, 488.

(s) Dig. 9, 2, 45.

(t) 1 Hale, P. C. 488.

(u) Puff. b. 2, c. 5, s. 13.

for if the person assaulted does not fall upon the aggressor till the affray is over, or falls upon him when he is running away, this is revenge, and not * defence. Neither, under the colour of self-defence, will the law [* 218] permit a man to screen himself from the guilt of deliberate murder: for if two persons, A and B, agree to fight a duel, and A gives the first onset, and B retreats as far as he safely can, and then kills A, this is murder; because of the previous malice and concerted design (x). But if A upon a sudden quarrel, assaults B first, and upon B's returning the assault, A really and *bonâ fide* flees; and, being driven to the wall, turns again upon B and kills him; this may be *se defendendo*, according to some of our writers (y); though others (z) have thought this opinion too favorable; inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault. Under this excuse, of self-defence, the principal civil and natural relations are comprehended; therefore, master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself (a).

There is one species of homicide *se defendendo*, where the party killed is equally innocent as he who occasions his death; and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by Lord Bacon (b), where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man's is excusable through unavoidable necessity, and the principle of self-defence; since their both remaining on the same weak plank is a mutual, * though innocent, attempt upon, and an endangering [* 219] of, each other's life.

To excusable homicide some slight degree of guilt was formerly attached by our law. Nor was the law of England singular in this respect. Even the slaughter of enemies required a solemn purgation among the Jews; implying that the death of a man, however it happens, will leave some stain behind it. And the Mosaical law (c) appointed certain cities of refuge for him "who killed his neighbour unawares: as if a man goeth into the wood with his neighbour to hew wood, and his hand fetcheth a stroke with the axe to cut down a tree, and the head slippeth from the helve, and lighteth upon his neighbour that he die, he shall flee unto one of these cities and live." But it seems he was not held wholly blameless, any more than in the English law; since the avenger of blood might slay him before he reached his asylum, or if he afterwards stirred out of it till the death of the high priest. In the imperial law likewise (d) casual homicide was excused, by the indulgence of the emperor signed with his own sign manual, "*annotationes principis*:" otherwise the death of a man, however committed, was in some degree punishable. Among the Greeks (e) homicide by misfortune was expiated by voluntary banishment

(x) 1 Hale, P. C. 479.

(y) *Ibid.* 482.

(z) 1 Hawk. P. C. 75.

(a) 1 Hale, P. C. 484.

(b) Elem. c. 5. See also 1 Hawk. P. C. 73.

(c) Numb. c. 35, and Deut. c. 19.

(d) Cod. 9, 16, 5.

(e) Plato, de Leg. lib. 9.

for a year (*f*). In Saxony a fine was paid to the kindred of the slain; which also, among the Western Goths, was little inferior to that of voluntary homicide (*g*); and in France (*h*) no person was ever absolved in cases of this nature, without a largess to the poor, and the charge of certain masses for the soul of the party killed.

[* 220] The penalty inflicted for excusable homicide by our laws * is said by sir E. Coke to have been anciently no less than death (*i*); which however is with reason denied by later writers (*k*). It seems rather to have consisted in a forfeiture, some say of all the goods and chattels, others of only part of them by way of fine or *weregild* (*l*): which was probably disposed of *in pios usus*, according to the humane superstition of the times, for the benefit of his soul who was thus suddenly sent to his account, with all his imperfections on his head. But that reason having long ceased, and the penalty (especially if a total forfeiture) growing more severe than was intended, in proportion as personal property became more considerable, the delinquent had, as early as our records will reach (*m*), a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same (*n*). And indeed to prevent this expense, in cases where the death had notoriously happened by misadventure or in self-defence, the judge who presided at the trial of the accused, usually permitted, if not directed, a general verdict of acquittal (*o*). And now it is expressly enacted by the statute, 24 & 25 Vict. c. 100, s. 7, that, "No punishment or forfeiture shall be incurred by any person who shall kill another by mistake or in his own defence, or in any other manner without felony." (694)

3. Felonious homicide is the killing of a human creature, without justification or excuse. This may be done by killing either one's self or another.

Self-murder. Self-murder, the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it seems to be

countenanced by the civil law (*p*), yet was punished by the
[* 221] * Athenian law with cutting off the hand which committed the desperate deed (*q*). And also the law of England wisely and religiously

(*f*) To this expiration by banishment the spirit of Patroclus in Homer may be thought to allude, when he reminds Achilles, in the twenty-third Iliad, that, when a child, he was obliged to flee his country for casually killing his playfellow; "*νηπιος οὐκ ἐθέλων*."

(*g*) Stiernh. de Jure Goth. l. 3, c. 4.

(*h*) De Morney on the Digest.

(*i*) 2 Inst. 148, 815.

(*k*) 1 Hale, P. C. 425; 1 Hawk. P. C. 75; Post. 282, &c.

(*l*) Post. 287.

(*m*) Post. 283.

(*n*) 2 Hawk. P. C. 381.

(*o*) Post. 288.

(*p*) "*Si quis impatientiâ doloris, aut tædio vitæ, aut morbo, aut furore, aut pudore, mori maluit, non animadvertatur in eum*." Dig. 49, 16, 6.

(*q*) Pot. Antiq. b. 1, c. 26.

(694) To justify taking away the life of an individual, upon the principle of self-defence, as a general rule, the danger must be actual and urgent. See, generally, *Lauder v. State*, 12 Texas, 462; *U. S. v. Vigol*, 2 Dall. C. C. 346; *State v. Morgan*, 3 Ired. (N. C.) 186; *People v. McLeod*, 1 Hill, 377; *Evans v. State*, 33 Ga. 4; *Com. v. Drum*, 58 Penn. St. 9; *Dock v. Com.*, 21 Gratt. (Va.) 909; *State v. Starr*, 38 Mo. 270; *Mitchell v. State*, 22 Ga. 211; *Gonzales v. State*, 34 Texas, 495; *Head v. State*, 44 Miss. 732; *People v. Scoggins*, 37 Cal. 676. And see *ante*, 2, 3, notes 427, 428.

As to the sacrifice of one or more persons to preserve the lives of others in shipwreck, see *United States v. Holmes*, 1 Wall. Jr. 1.

considers, that no man possesses power to destroy life, but by commission from God the author of it; and as the suicide is guilty of a double offence; one spiritual, in evading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the sovereign, who has an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. If one persuades another to kill himself, and he does so, the adviser is guilty of murder (*r*). And if two persons agree to commit suicide, and accordingly, both take poison or attempt to drown themselves together, but only one of them dies, it is murder in the survivor (*s*).

A *felo de se*, therefore, is he who deliberately puts an end to his own existence, or commits an unlawful malicious act, the consequence of which is his own death: as if, attempting to kill another, he runs upon his antagonist's sword; or, shooting at another, the gun bursts and kills himself (*t*). The party must be of years of discretion and in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our coroners' juries are apt to carry it, by holding that the very act of suicide is evidence of insanity; as if every man who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong; which is necessary, as was observed in * a former chapter (*u*), to form a legal excuse. And therefore, if a real lunatic kills himself [* 222] in a lucid interval, he is a *felo de se* as much as another man (*x*).

But now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him, his reputation and fortune.

Accordingly, by statute 4 Geo. 4, c. 52, the remains of persons against whom a finding of *felo de se* is returned, are to be privately buried in the church-yard or other burial ground of the parish or place, where the remains might have been otherwise interred, the interment to take place within twenty-four hours from the finding the inquisition, between nine and twelve at night; and without performance of the rites of Christian burial.

By suicide, also, the goods and chattels of the felon become forfeited to the crown; our law hoping that a man's care for either his reputation, or the welfare of his family may be some motive to restrain him from so desperate and wicked an act. And it is observable, that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cause of his death. As if husband and wife be possessed jointly of a term of years in land, and the husband drowns himself; the land shall be forfeited to the crown, and the wife shall not have it by survivorship. For by the act of casting himself into the water he forfeits the term, which gives a title to the crown, prior to the wife's title by survivorship, which could not accrue till the instant of her husband's death (*y*). And though it must be owned that the letter of the law herein borders a little upon severity, yet it is some alleviation that the power of miti-

(*r*) Kellw. 136.

(*s*) *R. v. Dyson*, Russ. & Ry. 523; *Reg. v. Alison*, 8 Car. & P. 418.

(*t*) 1 Hawk. P. C. 68; 1 Hale, P. C. 418.

(*u*) *Anst.* p. 19, *et seq.*

(*x*) 1 Hale, P. C. 412.

(*y*) Finch, L. 216.

gation is left in the breast of the sovereign, who upon this (as on all other like occasions) is reminded by the oath of his office to execute judgment in mercy. (695)

[* 223] *The other species of criminal homicide is that of killing another man, and in this offence there are degrees of guilt which divide it into manslaughter and murder. The difference between which Killing another. may be partly collected from what has been incidentally mentioned in the preceding articles, and principally consists in this, that manslaughter (when voluntary) arises from the sudden heat of the passions, murder from the wickedness of the heart.

(1.) Manslaughter is therefore defined to be (z)—the unlawful killing of another without malice express or implied: which may be either voluntarily, upon a sudden heat; or involuntarily, in the commission of some (1.) Manslaughter. unlawful act. These were called, in the Gothic constitutions, "*homicidia vulgaria; quæ aut casu, aut etiam sponte committuntur, sed in subitaneo quodam iracundiæ calore et impetu*" (a). And hence it follows, that in manslaughter there can be no accessories before the fact; because it must be done without premeditation.

As to the first or voluntary branch: if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter: and so it is, if Voluntary manslaughter. they upon such an occasion go out and fight in a field: for this is one continued act of passion (b): and the law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt. So also if a man greatly provoke another, as by pulling his nose, or other like indignity, and the person aggrieved immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, in the absence of previous malice; but it is manslaughter (c). Yet, in this, and in every other case of homicide upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked

[* 224] * afterwards kills the other, this act, being done through a deliberate feeling of revenge, not in heat of blood, accordingly amounts to murder (d). So if a man takes another in the act of adultery with his wife, and kills the adulterer directly upon the spot; though this was allowed by the laws of Solon (e), as likewise by the Roman civil law (if the adulterer was found in the husband's own house (f)), and also among the ancient Goths (g); yet in England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape, but it is manslaughter (h). Manslaughter, therefore, on a sudden provocation differs from excusable homicide *se defendendo* in this: that in one case there is an apparent necessity, for self-preservation, to

(z) 1 Hale, P. C. 466.

(a) Stiernh. de Jure Goth. l. 3, c. 4.

(b) 1 Hawk. P. C. 82.

(c) Kel. 185.

(d) Fost. 296.

(e) Plutarch, in Vit. Solon.

(f) Dig. 48, 5, 24.

(g) Stiernh. de Jure Goth. l. 3, c. 2.

(h) 1 Hale, P. C. 486. See *Reg. v. Fisher*, 8 Car. & P. 182.

(695) The offense of self-murder, or suicide, is not punishable in the United States. But if one counsel another to commit suicide, and the other, by reason of the advice, kills himself, the adviser is guilty of murder, as principal. *Com. v. Bowen*, 13 Mass. 356; and see *Com. v. Dennis*, 105 id. 162.

kill the aggressor: in the other no necessity at all, being only a sudden act of revenge. (696)

As to the second branch,—involuntary manslaughter, also differs from homicide excusable by misadventure, in this; that misadventure always happens in consequence of a lawful act, but this species of involuntary manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, unless, it is said (*i*), by the king's command, and one of them kills the other: this is manslaughter, because the original act was unlawful; but it is not murder, if the one had no intent to do the other any personal mischief (*k*). So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and the * workman [* 225] calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning (*l*); and murder, if he knows of their passing, and gives no warning at all, for then there is evidence of malice against all mankind (*m*). And, in strictness, when an involuntary killing happens in consequence of an unlawful act, it is either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it is murder; but if no more was meant than a mere civil trespass, it amounts only to manslaughter (*n*).

All struggles in anger are clearly forbidden by our law, and should death result to one of the parties engaged in such a contest the survivor will be guilty of manslaughter, perhaps even of murder (*o*). And where a conflict, terminating fatally, thus occurs between two persons, with a view to ascertaining the degree of guilt which may attach to the survivor, attention should be directed to these points. Who was the first aggressor? Did the homicide

(*i*) 1 Hale, P. C. 473; 1 Hawk. P. C. 74.

(*k*) 3 Inst. 56.

(*l*) Kel. 40.

(*m*) 3 Inst. 57.

(*n*) Foster, 258; 1 Hawk. P. C. 84.

(*o*) *Reg. v. Canniff*, 9 Car. & P. 359.

(696) No provocation that can be given is sufficient to render homicide justifiable, or even excusable. But if the provocation were great, the killing is manslaughter only. *Allen v. State*, 5 Yerg. (Tenn.) 458; *State v. Tackett*, 1 Hawks. (N. C.) 210; *Preston v. State*, 25 Miss. 383; *Com. v. York*, 9 Metc. (Mass.) 98; see *Hlanagan v. State*, 46 Ala. 703.

Thus, in a case where a man finds another in the act of adultery with his wife; if he kills either in the transport of passion, he is only guilty of manslaughter, and that of the lowest degree. *State v. Samuels*, 3 Jones (N. C.), 74; *Maher v. People*, 10 Mich. 212; *Com. v. Whittier*, 2 Brewster (Penn.), 388; see *Briggs v. State*, 29 Ga. 725.

And generally, where death ensues, in heat of blood, on immediate provocation, there having been no previous malice, the offense is manslaughter. *State v. Benham*, 28 Iowa, 154; *Gann v. State*, 30 Ga. 67; *McCann v. People*, 6 Park. 629; *Underwood v. State*, 25 Texas, 389; *Creek v. State*, 24 Ind. 151. But however grievous the provocation may have been, if there be sufficient time for the excited passion to cool, and for reason to interpose, the killing will be murder. *People v. Sullivan*, 7 N. Y. (8 Seld.) 396; *Gladden v. State*, 12 Fla. 563; see *State v. McCants*, 1 Spear (S. C.), 884; *Kilpatrick v. Com.*, 7 Casey (Penn.), 198; *State v. Norris*, 1 Hayw. (N. C.) 429; *Com. v. Green*, 1 Ashm. (Penn.) 289; *State v. Yarrowough*, 1 Hawks. (N. C.) 78.

occur pending the conflict, or after its conclusion, whilst the blood of the combatants was hot, or when passion had had time to cool? Is there patent, on the facts adduced in evidence, any formed design to kill another? or again, did the parties meet avowedly with an intent to murder?

On inquiring as to the legal character and quality of a homicide, nice and difficult questions may occur, especially where evidence is adduced in proof of negligence or breach of duty, causing death (*p*). The neglect of a [* 226] *personal duty, when death ensues as the consequence of such neglect, may render the party guilty of it liable to an indictment for manslaughter; but not only must the neglect to make the party guilty of it liable to the charge of felony be personal, the death must have been the immediate result of that personal neglect (*q*). If a physician or surgeon gives his patient a potion or plaster to cure him, which, contrary to expectation, kills him, this is neither murder, nor manslaughter, but misadventure; and it is punishable. In regard to such cases the rule applicable has been thus laid down. There is here "no difference between a licensed physician or surgeon, and a person acting as physician or surgeon without licence. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to exhibit a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered; then he is guilty of manslaughter" (*r*). We may add that if a wound, in itself not mortal, by improper applications becomes so, and terminates fatally, and it is clearly shown that the medicine, not the wound, was the cause of death, the party who inflicted the wound will not be guilty of murder (*s*). But where the wound was [* 227] adequate to produce death, it will not be an excuse to show *that, had proper care been taken, a recovery might have been effected (*t*). (697)

(2.) We are next to consider the crime of deliberate and wilful murder.

(*p*) *Reg. v. Dant*, L. & C. 567, shows that, if a man having a horse which he knows to be so vicious as to be dangerous, nevertheless turns it out into a field where there are to his knowledge open unfenced paths likely to be frequented, and death is caused by the savageness of the horse, a conviction for manslaughter may be had.

(*q*) *Per* Lord Campbell, C. J., *Reg. v. Pocock*, 17 Q. B. 84. As to the evidence which may

suffice to support a conviction for manslaughter resulting from the omission to perform a duty, see *Reg. v. Shepherd*, L. & C. 147; *Reg. v. Smith*, *Id.* 607; *Reg. v. Ryland*, 87 L. J. M. C. 10.

(*r*) *R. v. Webb*, 1 M. & Rob. 405; *R. v. Long*, 4 Car. & P. 423; *R. v. Spilling*, 2 M. & Rob. 107; *Reg. v. Markuss*, 4 F. & F. 356.

(*s*) 1 Hale, P. C. 428.

(*t*) *Id.*, *ib.*

(697) As it regards medical malpractice, it has been held in this country, that if a person, however ignorant of medical science, assumes to act as a physician, and prescribes with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed, or of the nature of the disease, or both, the patient dies in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter. *Com. v. Thompson*, 6 Mass. 134; *Rice v. State*, 8 Mo. 561. But if the party prescribing has sufficient knowledge of the fatal tendency of the prescription, that it may be reasonably presumed that he administered the medicine from an obstinate, willful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter at least, though he might not have intended any bodily harm to the patient. *Id.*; *Fairlee v. People*, 11 Ill. 1; *Holmes v. State*, 23 Ala. 17.

The term murder was anciently applied to the secret killing of another (*u*); (which the word *moerda* signifies in the Teutonic language (*x*); (2.) Murder. and it was defined, "*homicidium quod nullo vidente, nullo sciente, clam perpetratur*" (*y*): for which the vill wherein it was committed, or (if that were too poor) the whole hundred was liable to a heavy amercement; which amercement itself was also denominated *murdrum* (*z*). This was an ancient usage among the Goths in Sweden and Denmark; who supposed the neighbourhood, unless they produced the murderer, to have perpetrated or at least connived at the murder (*a*): and according to Bracton (*b*), the usage was introduced into this kingdom by King Canute, to prevent his countrymen the Danes from being privily murdered by the English; and was afterwards continued by William the Conqueror, for the like security of his own Normans (*c*). Therefore, if, upon inquisition had, it appeared that the person found slain was an Englishman (the presentment whereof was denominated *englescherie* (*d*)), the country seems to have been excused from this burden. But this usage being totally abolished by statute 14 Edw. 3, c. 4, we must now (as is observed by Staundforde (*e*)) define murder in quite another * manner without [* 228] regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction.

Murder is thus defined or rather described by sir Edward Coke (*f*); "when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." The best way of examining the nature of this crime will be by considering the several branches of this definition.

1st. It must be committed by "a person of sound memory and discretion:" for lunatics or infants, as was formerly observed (*g*), are incapable of committing crime: unless in cases where they show a consciousness of doing wrong, and of course a discretion, or capacity of discretion between good and evil. (698)

Next, it happens when a person of such sound discretion "unlawfully killeth." The unlawfulness arises from the killing without warrant or excuse: and there must also be an actual killing to constitute murder. The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. (699) Of all species of

(u) Dial. de Scacch. l. 1, c. 10.

(x) Stiernh. de Jure Sueon. l. 3, c. 3. The word *murdre* in our old statute also signified any kind of concealment or stifling. So in the statute of Exeter, 14 Edw. 1, "*je riens ne celerai, ne sufferai estre celé ne murdré*:" which is thus translated in Fleta, l. 1, c. 18, s. 4: "*Nullam veritatem celabo, nec celari permittam nec murdari*." And the words "*pur murdre le droit*" in the articles of that statute, are rendered in Fleta, *ibid.* s. 8, "*pro jure alicujus murdrando*."

(y) Glanv. l. 14, c. 8.

(z) Bract. l. 3, tr. 2, c. 15, s. 7; Stat. Marl. c. 26; Fost. 281.

(a) Stiernh. l. 3, c. 4.

(b) L. 3, tr. 2, c. 15.

(c) 1 Hale, P. C. 447.

(d) Bract. *ubi supra*.

(e) P. C. l. 1, c. 10.

(f) 8 Inst. 47.

(g) *Ante*, pp. 17, 19.

(698) See *ante*, 341, 342, notes 609 and 611.

(699) In an indictment for murder at common law, alleging the act to have been done with a specified instrument, it is not necessary to be proved that the act was done with that particular instrument. It will be sufficient if proved to have been done with some other instrument, if the nature of the violence and the kind of death occasioned by it be the same. See *State v. Smith*, 33 Me. 369; *Miller v. State*, 25 Wis. 384; *State v. Fox*, 1 Dutch. (N. J.) 566;

deaths, however, the most detestable is that by poison; because it can be least prevented either by manhood or by forethought (*h*). And therefore by the statute 22 Hen. 8, c. 9, it was made treason, and a more grievous and lingering kind of death was inflicted on it than the common law allowed; namely, boiling to death (*i*): but this act did not live long, having been repealed by statute 1 Edw. 6, c. 12. There was also, by the ancient common law, one [*229] species of killing held to *be murder, which may be dubious at this day; there not having been an instance wherein it was adjudged to be murder for many ages past (*k*): I mean by bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed (*l*). The Gothic laws punished in this case, both the judge, the witnesses, and the prosecutor: "*peculiari poenâ judicem puniunt; peculiari testes, quorum fides judicem seduxit; peculiari denique et maximâ auctorem, ut homicidam*" (*m*). And, among the Romans, the *lex Cornelia de sicariis*, punished the false witness with death, as being guilty of a species of assassination (*n*). And there is no doubt but this is equally murder *in foro conscientiæ* as killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such.

If a man does an act of which the consequence may probably be, and eventually is, death; such killing may be murder, although no stroke be struck by himself, and no killing were primarily intended: as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died (*o*); of the harlot, who laid her child under leaves in an orchard, where a kite struck it and killed it (*p*); and of the parish officers, who shifted a child from parish to parish, till it died for want of care and sustenance (*q*). And if a master refuse his apprentice necessary food, or treat [*230] him with *such harshness and severity, that his death is thereby occasioned, the law will imply malice, and the offence will be murder (*r*). So, too, if a man has a beast that is used to do mischief; that he,

(*h*) 8 Inst. 48.

(*i*) This extraordinary punishment seems to have been adopted by the legislature, from the peculiar circumstances of the crime which gave rise to it; for the preamble of the statute above cited informs us that John Roose, a cook, had been lately convicted of throwing poison into a large pot of broth, prepared for the bishop of Rochester's family, and for the poor of the parish; and the said John Roose was by a retrospective clause of the same statute ordered to be boiled to death. Lord Coke mentions several instan-

ces of persons suffering this punishment. 8 Inst. 48.

(*k*) Fost. 132; 1 Russ. Cr. 4th ed. 686—7.

(*l*) Mirror, c. 1, s. 9; Britt. c. 5; Bract. l. 8, c. 4.

(*m*) Stiernh. de Jure Goth. l. 2, c. 3.

(*n*) Dig. 48, 8, 1.

(*o*) 1 Hawk. P. C. 78.

(*p*) 1 Hale, P. C. 432.

(*q*) Palm. 545.

(*r*) *Reg. v. Marriott*, 8 Car. & P. 425; *R. v. Friend*, Russ. & Ry. 30; *Reg. v. Chandler*, Dears. 453.

Witt v. State, 6 Cold. (Tenn.) 5; *Dukes v. State*, 11 Ind. 557; *State v. Smith*, Phil. (N. C.) 340; *Com. v. Haines*, 6 Penn. Law Jour. 232; *State v. Jenkins*, 14 Rich. (S. C.) 215. If the indictment allege a death by one kind of poison, proof of a death by another kind of poison will support the indictment. *Ib.* But if one species of killing, as by poisoning, be charged, and the evidence shows a totally different species, as by shooting, stoning, strangling, etc., the variance will be fatal. *Ib.* So, *shooting* with a gun is not sustained by evidence of *striking* with a gun or other instrument. *Guedell v. People*, 43 Ill. 226. In further illustration, see the following cases: *Com. v. Macloon*, 101 Mass. 1; *People v. Colt*, 3 Hill, 432; *S. C.* again, 1 Park. 611; *State v. Baker*, 63 N. C. 276; *Lanergan v. People*, 39 N. Y. (12 Tiff.) 39; *Com. v. Fozz*, 7 Gray (Mass.), 585.

knowing it, suffers it to go abroad, and it kills a man; even this is manslaughter in the owner (s): but if he had purposely turned it loose, though barely to frighten people, and make what is called sport, it is as much murder, as if he had incited a bear or dog to worry them (t). (700)

Further; the person killed must be "a reasonable creature in being, and under the king's peace," at the time of the killing. Therefore to kill an alien, is as much murder as to kill the most regular born Englishman. To kill a child in its mother's womb, though a felony (u), is no murder; but if the child be born alive, and die by reason of the potion or bruises it received in the womb, it may be murder in the wrongdoer (x). And with regard to child-murder, a crime common and difficult of detection, it is especially enacted that, "If any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanor" (y). "Provided that if any person tried for the murder of any child shall be acquitted thereof; it shall be lawful for the jury by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as if such *person had been convicted upon an indictment for the [* 231] concealment of the birth" (z).

Lastly, the killing must be committed "with malice aforethought," to make it the crime of murder. This is the grand criterion which distinguishes murder from other killing: and this malice prepense *malitia præcogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart (a); *un*

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| <p>(s) See <i>Reg. v. Dant</i>, cited <i>ante</i>, p. 225, n. (p).</p> <p>(t) 1 Hale, P. C. 481.</p> <p>(u) <i>Post</i>.</p> | <p>(x) 3 Inst. 50; 1 Hawk. P. C. 80; <i>Reg. v. West</i>, 2 Car. & K. 784.</p> <p>(y) 24 & 25 Vict. c. 100, s. 60.</p> <p>(z) <i>Id.</i>, <i>ib.</i></p> <p>(a) <i>Foster</i>, 256.</p> |
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(700) As it regards responsibility for the killing, it is wholly immaterial whether the force were applied to the body or the mind (see *United States v. Freeman*, 4 Mason's C. C. 505); or whether with or without the consent of the person upon whom it operated. *Com. v. Parker*, 9 Metc. (Mass.) 263, 265. So, in respect to such responsibility, the *manner* of killing is immaterial; as, whether it was a blow, or a drug, or an instrument or other thing used to procure an abortion (see *Id.*; *Com. v. Keeper of Prison*, 2 Ashm. [Penn.] 227; *Ann v. The State*, 11 Humph. [Tenn.] 159; *Shorter v. People*, 2 N. Y. [2 Comst.] 193); or a ball discharged from a gun (*State v. Sisson*, 3 Brev. [S. C.] 58); or was of any other nature. See 2 Bish. Crim. Law, § 641.

Where death results from a blow, it is sufficient to fix responsibility, though the individual might have recovered, had he taken proper care of himself (*McAllister v. The State*, 17 Ala. 434); or had not refused to submit to a surgical operation; or had the surgeons properly treated the wound. *State v. Baker*, 1 Jones (N. C.), 267; *Com. v. Hackett*, 2 Allen (Mass.), 136. So if the wound *accelerated* the death, it is sufficient, although death would have soon ensued as a natural consequence from some other cause already operating. *State v. Moreau*, 2 Ala. 275; *Com. v. Fox*, 7 Gray (Mass.), 585. See *State v. Scates*, 5 Jones (N. C.), 420, 428.

But where the wound is not of itself mortal, and death takes place solely in consequence of the improper surgical or medical treatment, the party inflicting the wound is not responsible for the killing. *Parsons v. The State*, 21 Ala. 300. See *Com. v. Hackett*, 2 Allen (Mass.), 136, 141; *Com. v. McPike*, 3 Cush. (Mass.) 181; *State v. Scott*, 12 La. Ann. 274.

disposition à faire un mal chose (b); and it may be either express or implied in law. Express malice is when one, with a sedate, deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering the inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm (c). This takes in the case of deliberate duelling, the principals and seconds in which are, if the duel terminate fatally, alike guilty of murder (d).

Also, if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though the aggressor did not intend to cause death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia*. As when a park-keeper tied a boy, who was stealing wood, to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar; and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died; these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act [* 232] of slaughter (e). Neither shall he be guilty * of a less crime, who kills another in consequence of such a wilful act, as shows him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief (f), upon a horse used to kick, or coolly discharge a gun among a multitude of people (g). So if a man resolves to kill the next man he meets, and does kill him, this is murder, although he knew him not; for there is evidence of universal malice. And, if two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed, as to beat a man, to commit a riot, or to rob a park: and one of them kills a man; it is murder in them all, because of the unlawful act, the *malitia præcogitata*, or evil intended beforehand (h).

Also in many cases where no malice is expressed, the law will imply it: as where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved (i). If a prisoner, by duress of his gaoler, comes to an untimely end, this is murder. Nor, in order to constitute such duress, is it necessary that wounds be actually inflicted. And the reason why malice is here implied is this, the gaoler has been guilty of a breach of his duty, of the trust reposed in him by law, which requires, not that a prisoner shall be punished in gaol, but that he shall be safely kept. The act, moreover, was done deliberately, and therefore of malice prepense (k). And if a man kills another suddenly, without any, or without considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause (l). No affront, by words or gestures only, is a sufficient provocation, so as to [* 233] excuse or extenuate * such acts of violence as manifestly endanger the life of another (m). But if the person so provoked had unfortunately killed the other, by beating him in such a manner as showed only an intent to

(b) 2 Roll. Rep. 461.

(c) 1 Hale, P. C. 451.

(d) *Reg. v. Barronet*, Dears. 51; *Reg. v. Young*, 8 Car. & P. 644; *Reg. v. Cuddy*, 1 C. & K. 210.

(e) 1 Hale, P. C. 454, 473, 474.

(f) Lord Raym. 143.

(g) 1 Hawk. P. C. 74.

(h) 1 Hawk. P. C. 84.

(i) 1 Hale, P. C. 455; *R. v. Harvey*, 2 B. & C. 257, 268.

(k) *R. v. Huggins*, 17 St. Tr. 809.

(l) See further as to implied malice, *Oneby's Case*, 17 St. Tr. 44, 51.

(m) 1 Hawk. P. C. 82; 1 Hale, P. C. 455, 456.

chastise and not to kill him, the law so far considers the provocation of contumelious behaviour, as to adjudge it manslaughter, and not murder (*n*). In like manner if one kills an officer of justice (*o*), either civil or criminal, in the execution of his duty, or any of his assistants endeavouring to conserve the peace, or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murder (*p*.) And if one intends to do some other felony, and undesignedly kills a man, this also is murder (*q*). Thus, if one shoots at A and misses him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this likewise is murder (*r*). So also, if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it (*s*). It were endless to go through all the cases of homicide, which have been adjudged either expressly, or impliedly malicious: these, therefore, may suffice as specimens, and we may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where justified by the command or permission of the law; excused on the account of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly *lawful, or (if voluntary) occasioned by some sudden and sufficiently violent [* 234] provocation. And circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate the guilt. For all homicide is presumed to be malicious, until the contrary appears upon the evidence (*t*). (701)

(*n*) Fost. 291.

(*o*) *Mackalley's Case*, 9 Rep. 65.

(*p*) 1 Hale, P. C. 457; Fost. 308.

(*q*) 1 Hale, P. C. 465.

(*r*) 1 Hale, P. C. 466.

(*s*) *Ibid.* 429, *et vide*, post.

(*t*) Fost. 255.

(701) See *Com. v. Webster*, 5 Cush. (Mass.) 295, 305; *Shoemaker v. State*, 12 Ohio, 43; *State v. Martin*, 2 Ired. (N. C.) 101; *Dale v. State*, 10 Yerg. (Tenn.) 551; *McMillan v. The State*, 35 Ga. 75. Intent at the moment of striking the blow is sufficient to constitute malice. *People v. Clark*, 7 N. Y. (3 Seld.) 385; *Com. v. Drum*, 58 Penn. St. 9; *Coffee v. State*, 8 Yerg. (Tenn.) 288; *Lanergan v. People*, 50 Barb. 266; 84 How. Pr. 390; *Fahnestock v. State*, 23 Ind. 231; *McAdams v. State*, 25 Ark. 405; *McKensie v. State*, 26 id. 384.

Where a man willfully poisons another, malice is necessarily implied, however great the provocation may have been; because it is a deliberate act though no other proof of malice exists. *Green v. State*, 13 Miss. 382; *Com. v. Kinney*, 8 Boston Law R. 241; *Com. v. Norton*, id. 241.

The statutes of some of the States divide murder into two degrees: murder with a specific intent to take life being murder in the first degree; murder without a specific intent to take life being murder in the second degree. *Com. v. Gable*, 7 Serg. & R. (Penn.) 428; *Resp. v. Bob*, 4 Dall. (Penn.) 146; *Com. v. Green*, 1 Ashm. (Penn.) 289; *Bennett v. Com.*, 8 Leigh (Va.), 745; *Whiteford v. Com.*, 6 Rand. (Va.) 721; *State v. Hicks*, 27 Mo. 588; *People v. Potter*, 5 Mich. 1; *Dale v. State*, 10 Yerg. (Tenn.) 551; *State v. Shoults*, 25 Miss. 128; *People v. Barry*, 31 Cal. 357; *State v. Starr*, 38 Mo. 270; *Com. v. Drum*, 58 Penn. St. 9; *Com. v. Hanlon*, 8 Phila. (Penn.) 401; *Rowan v. State*, 30 Wis. 128; *State v. Spencer*, 1 Zab. (N. J.) 196. Under these statutes, a common-law indictment for murder is sufficient to support murder either in the first or second degree. *Green v. Com.*, 12 Allen (Mass.), 153; *People v. Bonilla*, 38 Cal. 699; *McAdams v. State*, 25 Ark. 405; *Fitzgerald v. People*, 37 N. Y. (10 Tiff.)

It will not of course be supposed that counsel for the prosecution on a charge of murder should rely merely upon the operation against the accused of the presumption stated, and so restrict himself to establishing the bare fact of homicide. It is the duty of counsel on a criminal prosecution, especially in a case so serious as supposed, fully and fairly to set forth the facts which can be proved, neither extenuating them nor yet unduly pressing them against the prisoner, or colouring them to ensure conviction. Justice is, in such a case, best satisfied where the opening statement of counsel is calm and unimpassioned, and where the evidence against the accused is frankly and freely submitted, without embellishment, to the court and jury (*u*).

[* 235] In accordance with what has been already said, the * indictment for murder charges that the defendant did "feloniously, wilfully, and of his malice aforethought, kill and murder" the deceased; and an indictment for manslaughter charges that the defendant did "feloniously kill and slay" the deceased (*x*). And upon an indictment for the more serious of these offences the jury may, if so minded, return a verdict that the accused is guilty of manslaughter (*y*). Such an indictment lies and is triable in our courts for murder or manslaughter, committed by a subject of the crown on land out of the United Kingdom, whether or not within the Queen's dominions, and whether the person killed were a subject of her majesty or not (*z*). And where a person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England, dies of such stroke, poisoning, or hurt in England, or being feloniously stricken, poisoned, or otherwise hurt at any place in England, dies of such stroke, poisoning, or hurt upon the sea, or at any place out of England, every offence committed in respect of any such case, whether the same amount to the offence of murder or of manslaughter, may be tried, and punished in the county or place in England in which such death, stroke, poisoning, or hurt may have happened, in the same manner as if such offence had been wholly committed in that county or place (*a*).

A bill of indictment for felonious homicide may be preferred at any time, no matter how long the interval, after commission of the offence; but where the charge is of this nature our law deems it safer *in favorem vitæ*, that the period elapsing between the death and its cause should be restricted within

(*u*) As to evidence which may suffice to support an indictment for murder, see the *Trial of Captain Kidd*, 14 St. Tr. 123; *R. v. Annesley*, 17 Id. 1094. As to proof of the *corpus delicti* at a trial for felonious homicide, see 2 Hale, P. C. 290; *R. v. Hindmarsh*, 2 Leach, 509.

By the stat. 9 & 10 Vict. c. 93 ("an act for compensating the families of persons killed by accidents"), it is enacted (s. 1) that whosoever the death of a person "shall be caused by wrongful act, neglect, or default," such that, if death had not ensued, the party injured would have been entitled to maintain

an action, and recover damages in respect thereof, "the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured," and although the death were "caused under such circumstances as amount in law to felony." But every such action must be commenced within twelve calendar months after the death of the deceased (s. 3).

(*x*) 24 & 25 Vict. c. 100, s. 6.

(*y*) *Mackalley's Case*, 9 Rep. 67.

(*z*) 24 & 25 Vict. c. 100, s. 9.

(*a*) Id. s. 10.

413; *White v. State*, 16 Texas, 206; *Livingston's Case*, 14 Gratt. (Va.) 592; *Hines v. State*, 8 Humph. (Tenn.) 597; *Kennedy v. People*, 39 N. Y. (12 Tiff.) 245; *State v. Lessing*, 16 Minn. 75; *State v. Millain*, 3 Nev. 409; *Fahnestock v. State*, 23 Ind. 281; *Com. v. Wicks*, 3 Va. Cas. 387; *State v. Verrill*, 54 Me. 408; *Pike v. State*, 49 N. H. 399. But see as to Iowa, *State v. Watkins*, 27 Iowa, 415; *State v. McCormick*, id. 402; Missouri, *State v. Jones*, 20 Mo. 58; *Bower v. State*, 5 id. 364; California, *People v. Murray*, 10 Cal. 309; *People v. Urias*, 12 id. 325.

reasonable and definite limits, for it may not be easy to connect with certainty cause and effect after a long interval of time. Accordingly no person shall be adjudged by any act whatever to have killed another, if that other does not die within a year and a day after the *stroke received, or cause of death [* 236] administered, i. e., within a year, exclusive of the day on which the mortal blow was given, or the cause of death was administered (b). (702)

As to the punishment of felonious homicide, it is enacted that, "whosoever shall be convicted of manslaughter shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than [five] years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, or to pay such fine as the court shall award, in addition to or without any such other discretionary punishment as aforesaid" (c).

Also, in case of any felony, punishable under the act concerning offences against the person, otherwise than with death, the court may, if it shall think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment by that act authorised; provided that no person be imprisoned for not thus finding sureties, for any period exceeding one year (d).

It is further enacted by the same statute that, "whosoever shall be convicted of murder shall suffer death" (e).

II. As regards a soliciting or conspiring (f) to murder, it has been enacted (g) that, "all persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of her majesty or not, and whether he be within the Queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanor" (h).

* Also, upon a conviction for "any indictable misdemeanor," [* 237] punishable under the act which concerns offences against the person, the court may, if it shall think fit, in addition to, or in lieu of any punishment by that act authorised, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour: provided that no person be imprisoned for not thus finding sureties for any period exceeding one year (i).

Having in the preceding pages considered the principal crime, or public wrong, that can be committed against a private subject, namely, by destroying or by conspiring to destroy his life, I proceed to inquire into such other criminal acts as more peculiarly affect the security of his person, while living.

Acts of violence directed against the person, such as will now be treated of, are for the most part punishable in accordance with the provisions of the statute

(b) 1 Hawk. P. C. 79.

(c) 24 & 25 Vict. c. 100, s. 5.

(d) Id. s. 71.

(e) Id. s. 1.

(f) *Ante*, p. 152.

(g) See *Reg. v. Bernard*, 1 F. & F. 240.

(h) 24 & 25 Vict. c. 100, s. 4. Punishment: penal servitude for any term not more than ten nor less than five years; or imprisonment for any term not exceeding two years, with or without hard labour.

(i) 24 & 25 Vict. c. 100, s. 71.

law. Every offence, indeed, against the person, which experience has brought to notice, or which ingenuity can suggest, has been thus expressly provided for, although for the definition of an offence, the necessary ingredients therein and rules concerning it, the criminal pleader often finds himself remitted to our ancient customary law, as expounded by lord Coke in his Third Institute, and annotated by distinguished writers. The commentator upon crown law must therefore, in treating of specific offences, avail himself when practicable of statutory language (for which synonymous expressions cannot safely or usefully be substituted), recurring as occasion may require to the unwritten law—the Treatises and reports—with a view to amplifying and illustrating his subject. In the remainder of this chapter will be considered: 1st. [*238] Attempts *to commit murder; 2ndly. Acts causing or tending to cause danger to life or bodily harm; 3rdly. Assaults, and some offences akin thereto; 4thly. Offences against females; and lastly, Unnatural offences.

III. Attempts to commit murder. III. Each of the undermentioned acts (*j*) done with intent (*k*) to commit murder is indictable and punishable (*l*) as below mentioned.

1. The administering to, or causing to be administered to, or taken by any person, any poison or other destructive thing, or the wounding (*m*), or causing any grievous bodily harm to any person, by any means whatsoever (*n*).

2. The destroying or damaging any building by the explosion of gunpowder or other explosive substance (*o*).

3. The setting fire to any ship or vessel, or any part thereof, or any part of the tackle, apparel, or furniture thereof, or any goods or chattels being therein, or casting away or destroying any ship or vessel (*p*).

[*239] 4. The attempting to administer to, or attempting to *cause to be administered to, or taken by any person, any poison or other destructive thing, or shooting at any person, or by drawing a trigger, or in any other manner, attempting to discharge any kind of loaded arms at any person, or attempting to drown, suffocate, or strangle any person, whether any bodily injury be effected or not (*q*).

5. The attempting, by any means other than those specified in any of the last preceding paragraphs, to commit murder (*r*). (703)

(*j*) An attempt to commit a crime may be indictable at common law. *R. v. Higgins*, 2 East, 5; *R. v. Vaughan*, 4 Burr. 2494.

(*k*) Of which intent the jury are to judge, aided by the presumption that a man intends to do that which is the necessary or natural consequence of his act.

(*l*) In connection with the punishment of any felony (hereinafter specified) under the statute concerning offences against the person (24 & 25 Vict. c. 100), reference must be made to s. 71, cited *ante*, p. 236.

(*m*) If, upon the trial of an indictment for any felony, except murder or manslaughter, where the indictment alleges that the accused did cut, stab, or wound any person, the jury be satisfied that the defendant is guilty of

the cutting, stabbing, or wounding charged in the indictment, but are not satisfied that the defendant is guilty of the felony therein charged, the jury may acquit of the felony, and return a verdict of guilty of the misdemeanor. 14 & 15 Vict. c. 19, s. 5.

(*n*) 24 & 25 Vict. c. 100, s. 11. Punishment: penal servitude for life, or for not less than five years; or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(*o*) Id. s. 12. Punishment: *ut supra*.

(*p*) Id. s. 13. Punishment: *ut supra*.

(*q*) Id. s. 14. Punishment: *ut supra*.

(*r*) Id. s. 15. Punishment: *ut supra*.

(703) An attempt to murder is only a misdemeanor, unless a special statutory provision makes it felony. *State v. Danforth*, 8 Conn. 112; *O'Leary v. People*, 4 Park. 187; *State v. Boyden*, 18 Ired. (N. C.) 505; *Phillips v. Kelley*, 29 Ala. 628; *Com. v. Barlow*, 4 Mass. 439.

IV. Criminal acts next in order to be noticed are such as cause, or tend to cause, danger to life, or bodily harm. Acts referable to this class have become

more diverse in kind, and more complex in their nature than of old, and hence the legislature has deemed it expedient to specify each of such offences, and to assign to each of them its punishment.

Mayhem, *mayhemium*, is an offence known to our common law, and was in part considered in the preceding volume as a civil injury: but it is also looked upon in a criminal light, being an atrocious breach of the peace, and tending to deprive the sovereign of the aid and assistance of his subjects. For mayhem is properly defined to be the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself, or to annoy his adversary (s). And therefore, the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or fore-tooth, or depriving him of those parts the loss of which in all animals abates their courage, are held to be mayhems. But the cutting off his ear, or nose, or the like, is not held to be mayhem at common law; because this does not weaken, but only disfigures him.

By the ancient law of England, he who maimed any * man whereby he lost any part of his body, was sentenced to lose the like part; [* 240] *membrum pro membro* (t). But this went afterwards out of use: partly because the law of retaliation, as was formerly shown (u), is at best an inadequate rule of punishment; and partly because upon a repetition of the offence, the punishment could not be repeated. So that, by the common law, as it for a long time stood, mayhem was only punishable with fine and imprisonment (x); unless, perhaps, the offence of mayhem by castration, which all our old writers held to be felony: "*et sequitur aliquando pœna capitalis, aliquando perpetuum exilium, cum omnium bonorum ademptione*" (y). (704)

But subsequent statutes put the crime and punishment of mayhem more out of doubt. For first, by statute 5 Hen. 4, c. 5, to remedy a mischief that then prevailed of beating, wounding, or robbing a man, and then cutting out his tongue, or putting out his eyes, to prevent him from giving evidence against the offender, this offence was declared to be felony, if done of malice prepense; that is, as sir Edward Coke (z) explains it, voluntarily, and of set purpose, though done upon a sudden occasion. Next, in order of time, was the statute 37 Hen. 8, c. 6, which directed that if a man should maliciously and unlawfully cut off the ear of any of the king's subjects, he should not only forfeit treble damages to the party grieved, to be recovered by action of trespass at common law, as a civil satisfaction; but also 10*l.* by way of fine to the king,

(s) Britt. l. 1, c. 25; 1 Hawk. P. C. 111.

(t) 3 Inst. 118. "*Mes, si la pleynte, soit faite de femme qu'averà tolle a home ses membres, en tel case perdra le feme la une meyn par jugement, come le membre dount ele averà trespasse.*" Brit. c. 25.

(u) *Ante*, p. 8.

(x) 1 Hawk. P. C. 112.

(y) Bract. fol. 144; 3 Inst. 62.

(z) 3 Inst. 62.

(704) The common-law offense of mayhem is not generally considered felony in this country; unless, perhaps, in cases of mayhem by castration. *Com. v. Lester*, 2 Va. Cas. 198; *Com. v. Newell*, 7 Mass. 245; *Adams v. Barrett*, 5 Ga. 404; see *State v. Thompson*, 30 Mo. 470; *State v. Absence*, 4 Port. (Ala.) 397.

As to the statutory offense, see *Com. v. Langacke*, 1 Yeates (Penn.), 417; *Esckridge v. The State*, 25 Ala. 30; *State v. Crawford*, 2 Dev. (N. C.) 425; *Chick v. The State*, 7 Humph. (Tenn.) 61; *United States v. Scroggins*, 1 Hemp. 478.

which was his criminal amercement. By far the most severe and effectual, however, of former statutes for the repression of mayhem was the 22 & 23 Car. 2, c. 1, called the Coventry act; being occasioned by an assault on sir John [* 241] Coventry in the street, and slitting his nose, in *revenge (as was supposed) for some obnoxious words uttered by him in parliament. By this statute it was enacted, that if any person should of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person with intent to maim or to disfigure him; such person, his counsellors, aiders, and abettors, should be guilty of felony (a).

Offences involving or akin to mayhem are now punishable under various sections of the 24 & 25 Vict. c. 100, constituting each of the undermentioned acts if done "unlawfully and maliciously" (b), a felony:—

1. The preventing or impeding any person, being on board of or having quitted any ship or vessel in distress, or wrecked, stranded, or cast on shore, in his endeavour to save his life, or preventing or impeding any person in [* 242] *his endeavour to save the life of any such person as aforesaid (c).

2. The wounding, or causing grievous bodily harm, by any means whatsoever, to any person, or shooting at any person (d), or, by drawing a trigger, or in any other manner, attempting to discharge any kind of loaded arms (e) at any person, with intent, in any such case, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person (f).

3. The administering to, or causing to be administered to, or taken by any other person, any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm (g).

(a) On this statute Mr. Coke, a gentleman of Suffolk, and one Woodburn, a labourer, were indicted in 1722; Coke for hiring and abetting Woodburn, and Woodburn for the actual act of slitting the nose of Mr. Crispe, Coke's brother-in-law. The case was somewhat singular. The murder of Crispe was intended, and he was left for dead, being terribly hacked and disfigured with a hedge-bill; but he recovered. Now the bare intent to murder was no felony; but to disfigure, with an intent to disfigure, was made so by this statute; on which they were therefore indicted. And Coke, who was a disgrace to the profession of the law, had the effrontery to rest his defence upon this point, that the assault was not committed with an intent to disfigure, but with an intent to murder: and therefore not within the statute. But the court held, that if a man attacks another to murder him with such an instrument as a hedge-bill, which cannot but endanger the disfiguring him; and in such attack happens not to kill, but only to disfigure him; he might be indicted on this statute; and it should be left to the jury to determine whether it were not a design to murder by disfiguring, and consequently a malicious intent to disfigure as well as to murder. Accordingly the jury found the accused guilty of a previous

intent to disfigure, in order to effect their principal intent to murder, and they were both condemned and executed. 16 St. Tr. 53.

(b) As to the legal significance of the words "unlawfully and maliciously," see *R. v. Schofield*, 81 St. Tr. 1035; *R. v. Salmon*, Russ. & Ry. 28.

(c) S. 17. Punishment: penal servitude for life, or for not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(d) By the 16 & 17 Vict. c. 107, s. 249, any person maliciously shooting at any vessel belonging to the royal navy, or in the revenue service, or at any person duly employed for the prevention of smuggling, is guilty of felony.

(e) By 24 & 25 Vict. c. 100, s. 19, "any gun, pistol, or other arms which shall be loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms" within the meaning of the act, "although the attempt to discharge the same may fail from want of proper priming or from any other cause."

(f) S. 18. Punishment: *ut supra*, n. (c).

(g) S. 23. Punishment: penal servitude for any term not exceeding ten nor less than

4. The burning, maiming, disfiguring, disabling, or doing any grievous bodily harm to any person by the explosion of gunpowder or other explosive substance (*h*).

* 5. The causing any gunpowder or other explosive substance to explode, or sending, or delivering to, or causing to be taken or received by any person any explosive substance, or any other dangerous or noxious thing, or putting or laying at any place, or casting or throwing at or upon, or otherwise applying to any person, any corrosive fluid or any destructive or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable, or to do some grievous bodily harm to any person, whether any bodily injury be effected or not (*i*). [* 243]

6. The placing or throwing into, against, or near any building, or vessel, any gunpowder, or other explosive substance, with intent to do any bodily injury to any person, whether or not any explosion takes place, and whether or not any bodily injury be effected (*k*).

7. The putting upon any railway any wood, stone, or other thing, or taking up, removing, or displacing any rail, sleeper, or other thing belonging to any railway, or turning, moving, or diverting any points or other machinery belonging thereto, or showing, or removing any signal or light, upon or near to any railway, or doing or causing to be done any other thing, with intent to endanger the safety of any person travelling or being thereupon (*l*).

8. The throwing at or causing to fall upon any engine or carriage, used upon any railway, any wood, stone, or * other thing, with intent to injure or endanger the safety of any person being upon or in such engine, or carriage, or any other engine, or carriage, belonging to the train (*m*). [* 244]

9. The attempting by any means whatsoever, to choke, suffocate, or strangle any person, or attempting by any means calculated to choke, suffocate, or strangle, to render any other person insensible, unconscious, or incapable of resistance (*n*). Whipping may also be inflicted under 26 & 27 Vict. c. 44.

10. The unlawfully applying or administering to, or causing to be taken by, or attempting to apply or administer to, or to cause to be administered to or taken by, any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing,—with intent in any of such cases thereby to enable any person to commit any indictable offence (*o*).

five years,—or imprisonment for any term not exceeding two years, with or without hard labour.

If, upon the trial of any person for any felony under the above section, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of a misdemeanor (*post*, p. 244), they may acquit the accused of such felony, and find him guilty of the misdemeanor. S. 25.

(*h*) S. 28. Punishment: penal servitude for life, or for not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*i*) S. 29. Punishment: *ut supra*.

(*k*) S. 30. Punishment: penal servitude for any term not exceeding fourteen nor less than five years,—or imprisonment for any

term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*l*) S. 32. Punishment: penal servitude for life, or for not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

(*m*) S. 33. Punishment: penal servitude for life, or for any term not less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour.

(*n*) S. 21. Punishment: *ut supra*. In an indictment framed upon the above or any similar section, it may be expedient to insert several counts varying the statement of the overt act and of the intent.

(*o*) S. 22. Punishment: *ut supra*.

Such are the acts causing or tending to cause danger to life, or bodily harm, which have by statute been constituted felonies; the following criminal acts included in the class under our notice have, in like manner, been constituted misdemeanors:—

1. The “unlawfully and maliciously” (*p*) wounding or inflicting any grievous bodily harm upon any other person, either with or without any weapon or instrument (*q*),—or administering to, or causing to be administered to, or taken by any other person, any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person (*r*).

[* 245] 2. The refusing or neglecting, wilfully and without *lawful excuse—by one who is legally liable, either as a master or mistress, to provide for an apprentice or servant necessary food, clothing, or lodging—to provide the same, or the unlawfully and maliciously doing, or causing to be done, any bodily harm to any such apprentice or servant, so that his life be endangered, or his health be permanently injured (*s*).

3. The unlawfully abandoning or exposing any child, under the age of two years, whereby the life of such child shall be endangered, or its health be permanently injured (*t*).

4. The setting, or causing to be set, any spring gun, or other engine calculated to destroy human life, or inflict grievous bodily harm, with intent that the same, or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith (*u*).

5. The endangering, or causing to be endangered, by any unlawful act, or by any wilful omission or neglect, the safety of any person conveyed or being upon a railway (*x*).

6. And whosoever, having the charge of any carriage or vehicle, shall, by wanton or furious driving, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person, may likewise be indicted for a misdemeanor (*y*).

Having in the preceding pages noticed *seriatim* attempts to commit murder, and acts described in statutory *language as “causing or tending to cause danger to life or bodily harm,” next in order to the foregoing offences, assaults will claim our attention.

V. With regard to the nature of an assault, I have little to add to what has already been observed in the preceding book of these Commentaries; when we

V. Assaults. considered it as a private wrong, or civil injury, for which a satisfaction or remedy is given to the party aggrieved. Taken in a public light, as a breach of the peace, an affront to the government, and a damage done to the subjects of the crown; an assault is also indictable and punishable. It is an attempt to commit a battery, or an act indicating an intention to do violence to the person of another, as by pointing a gun at him,

(*p*) *Ante*, p. 241 (*b*).

(*q*) 24 & 25 Vict. c. 100, s. 20. Punishment: penal servitude for five years,—or imprisonment for any term not exceeding two years, with or without hard labour.

(*r*) S. 24. Punishment: *ut supra*.

(*s*) S. 26. Punishment: penal servitude for five years,—or imprisonment for any term not exceeding two years, with or without hard labour.

(*t*) S. 27. Punishment: *ut supra*.

(*u*) S. 31. Punishment: *ut supra*.

The above section provides, however, that it shall not be illegal to set any trap such as may be usually set with the intent of destroying vermin; nor, from sunset to sunrise, to set any spring gun or other engine in a dwelling-house, for the protection thereof.

(*x*) S. 34. Punishment: imprisonment for any term not exceeding two years, with or without hard labour.

(*y*) S. 35. Punishment: *ut supra*.

within a distance to which it will carry, striking at him or the like (z). A battery includes not only beating and wounding, but even the touching or laying hold of another's person or clothes in an angry or hostile manner (a). (705)

There are some species of battery, more penal than the rest, such as the beating of a clerk in orders, on account of the respect and reverence due to his sacred character as the minister and ambassador of peace; and it is accordingly enacted by the statute, 24 & 25 Vict. c. 100, s. 36, that, whosoever shall, by threats or force, obstruct or prevent, or endeavour to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, or place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or shall strike or offer any violence to, or shall, upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or, to the knowledge of the offender, is about *to engage in any of the rites or [* 247] duties above particularized, or who, to the knowledge of the offender, shall be going to perform the same, or returning from the performance thereof, shall be guilty of a misdemeanor, and punishable as undermentioned (b) Also, by s. 37 of the same statute, "Whosoever shall assault any magistrate, officer, or other person lawfully authorised, whilst performing his duty in the preservation of any vessel in distress, or of any vessel, or goods, wrecked, or lying under water, shall be guilty of a misdemeanor" (c). Assaults, more-

(a) *Reg. v. St. George*, 9 C. & P. 488.

(b) Archb. Cr. Pl. 16th ed. 612, 613.

(c) By imprisonment for any term not exceeding two years, with or without hard labour.

(c) Punishment: penal servitude for not more than seven years nor less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour.

(705) As to American definitions of an assault, see *Johnston v. The State*, 85 Ala. 363, 365; *Smith v. State*, 39 Miss. 521; *Rainbolt v. State*, 34 Texas, 286; *Com. v. Stoddard*, 9 Allen (Mass.), 280; *People v. Yolas*, 27 Cal. 630, 633; *State v. Malcolm*, 8 Iowa, 418. To constitute an assault, there must be the commencement of an act, which, if not prevented, would produce a battery. *Larson v. The State*, 30 Ala. 14. The force must be physical. No words whatsoever can amount to an assault. *People v. Bransby*, 32 N. Y. (5 Tiff.) 525, 532; see *Com. v. Eyre*, 1 Serg. & R. (Penn.) 847; *State v. Crow*, 1 Ired. (N. C.) 375. The kind of physical force is, however, wholly immaterial. See *People v. Lee*, 1 Wheel. Cr. Cas. 364; *State v. Sims*, 3 Strobb. (S. C.) 137; *People v. McMakin*, 8 Cal. 547; *State v. Church*, 68 N. C. 15; *State v. Rawles*, 65 id. 334; *State v. Myers*, 19 Iowa, 517; *Richels v. State*, 1 Sneed (Tenn.), 606; *Com. v. Simmons*, 6 J. J. Marsh. (Ky.) 615.

A battery is any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent. 2 Bish. Cr. Law, § 70; see *Long v. Rogers*, 17 Ala. 540; *Pike v. Hanson*, 9 N. H. 491. An assault is included in every battery. *State v. Freels*, 3 Humph. (Tenn.) 228; *Evans v. The State*, 1 id. 394; *Johnson v. The State*, 17 Texas, 515. As to what is sufficient to constitute a battery, see id.; *State v. Davis*, 1 Hill (S. C.), 46; *Res. v. De Longchamps*, 1 Dall. 111; *United States v. Ortega*, 4 Wash. C. C. 531.

An assault is more or less aggravated according to the facts of the particular transaction. See *Norton v. State*, 14 Texas, 387. Among aggravated simple assaults are those committed in courts of justice, and upon officers of the courts, or upon other official characters. See id.; *Com. v. Kirby*, 2 Cush. (Mass.) 577.

Assault is a misdemeanor, and not a felony (*Com. v. Barlow*, 4 Mass. 439); even in case of an aggravated assault. *Com. v. McLaughlin*, 12 Cush. (Mass.) 612; *People v. Wilson*, 9 Cal. 259.

It is held that an indictment at common law lies for a solicitation to inflict a battery *United States v. Lyles*, 4 Cranch's C. C. 469.

over, when committed upon persons whom it has been deemed expedient specially to protect, or committed in the prosecution of crime, are, by various statutory provisions, visited with severe punishment (*d*).

An assault occasioning actual bodily harm (*e*), or with intent to commit felony (*f*), exposes the offender, on conviction, to a punishment heavier than can be awarded for a common assault (*g*). For which last-named offence an indictment will lie, or a summary conviction may be had before two justices [* 248] of the peace (*h*). Should, however, * the justices, upon investigation, find the assault or battery complained of to have been accompanied by an attempt to commit felony, or should they be of opinion that it is, from any other circumstance, a fit subject for prosecution by indictment, they are to abstain from adjudicating thereupon, and to deal with the case in all respects as if they had no authority finally to hear and determine it. Nor are justices authorised to hear and determine any case of assault or battery in which a question may arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom (*i*), or as to any bankruptcy, or any execution under the process of a court of justice (*k*).

Further, when any person is charged before justices with an assault or battery upon a male child, whose age does not in their opinion exceed fourteen years, or upon any female, whether upon the complaint of the party aggrieved, or otherwise, the said justices, if the assault or battery is of such an aggravated nature that it cannot, in their opinion, be sufficiently punished as a common assault and battery, may proceed to hear and determine the same in a summary way, and if the same be proved, may convict the person accused, and punish him as undermentioned (*l*).

Again, if the justices, upon the hearing of any case of common assault or of assault upon a child or female upon the merits, where the complaint was preferred by or on * behalf of the party aggrieved, shall deem the offence [* 249] not to be proved, or shall find the assault to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint; they are forthwith to make out a certificate under their hands stating the fact of such dismissal, and to deliver such certificate to the party against whom the complaint was preferred (*m*). And any person, having

(*d*) See, for instance, the 24 & 25 Vict. c. 96, ss. 16, 42, 43; *ante*, p. 141.

(*e*) 24 & 25 Vict. c. 100, s. 47. Punishment: penal servitude for five years,—or imprisonment for not more than two years, with or without hard labour.

(*f*) S. 38. Punishment: imprisonment for not more than two years, with or without hard labour.

(*g*) For which the punishment after conviction upon indictment is imprisonment for not more than one year, with or without hard labour. 24 & 25 Vict. c. 100, s. 47.

As to payment of the prosecutor's costs, see *Id.* ss. 74, 75.

(*h*) 24 & 25 Vict. c. 100, s. 42. Punishment: imprisonment, with or without hard labour, for any term not exceeding two months; or fine not exceeding, together with costs (if ordered), the sum of 5*l.*; and if such fine, together with the costs (if ordered), "shall not be paid, either immediately after the

conviction or within such period as the said justices shall at the time of the conviction appoint, they may commit the offender to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding two months, unless such fine and costs be sooner paid."

(*i*) See Paley on Conv., 5th ed. 137.

(*k*) 24 & 25 Vict. c. 100, s. 46.

(*l*) S. 43. Punishment: imprisonment, with or without hard labour, for not more than six months,—or fine not exceeding (together with costs) the sum of 20*l.*, and in default of payment, imprisonment for not more than six months, unless such fine and costs be sooner paid; and, if the justices shall so think fit, the offender may be bound to keep the peace and be of good behaviour for any period not exceeding six months from the expiration of the sentence.

(*m*) S. 44.

obtained such certificate, or having been convicted, and having paid the whole amount adjudged to be paid, or suffered the imprisonment awarded, will be released from further proceedings, civil or criminal, for the same cause (n).

VI. The two next crimes and offences, against the persons of her majesty's subjects, are infringements of their natural liberty: concerning the first of which, false imprisonment, its nature and incidents, I must content myself with referring the student to what was observed in the preceding volume, when we considered it as a mere civil injury. But besides the private satisfaction given to the individual by action, the law also demands public vengeance for the breach of the peace, for the loss which the state sustains by the confinement of one of its members, and for the infringement of the good order of society. We have before seen (o), that the most atrocious degree of this offence, that of sending any subject of the realm a prisoner into parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is punished with the pains of *præmunire*, and capacity to hold any office, without a possibility of pardon (p). Inferior degrees of the same offence of false imprisonment are also punishable on indictment (like assaults and batteries), by fine and imprisonment (q). And, indeed, there can be no *doubt, but that [* 250] all kinds of crimes of a public nature, all disturbances of the peace, all oppressions, and other misdemeanors whatsoever of a notoriously evil example, may be indicted at the suit of the crown (r). (706)

VII. The offence of kidnapping, being the forcible abduction or stealing away of a man, woman, or child, was capital by the Jewish law. "He that VII. Kidnapping, stealeth a man, and selleth him, or if he be found in his hand, he &c. shall surely be put to death" (s). So likewise in the civil law, the offence of spiriting away and stealing men and children, which was called *plagium*, and the offenders *plagiarii* was punished with death (t). This is unquestionably a very heinous crime, as it robs the crown of its subjects, banishes a man from his country, and may in its consequences be productive of the most cruel and disagreeable hardships; therefore the common law of England has punished it with fine, and imprisonment (u). (707)

(n) S. 45. See *Reg. v. Morris*, 36 L. J. M.

C. 84.

(o) *Ante*, p. 115.

(p) Stat. 81 Car. 2, c. 2.

(q) West. Symbol. part 2, p. 92.

(r) 1 Hawk. P. C. 210.

(s) Exod. xxi. 16.

(t) Dig. 48, 15, 1.

(u) *Designy's Case*, T. Raym. 474; *R. v. Wilmore*, Skinn. 47.

(706) Every unlawful restraint of personal liberty is an imprisonment, whether accompanied by corporal touch or not — whether in a house, in a shop, or in the street. But force of some sort must be used, and it must be a detention against the will, and it is indispensable that these two circumstances should unite. *Moses v. Dubois*, Dudley (S. C.), 209, 211. And see *State v. Edge*, 1 Strobb. (S. C.) 91, 93; *State v. Rollins*, 8 N. H. 550; *Pike v. Hanson*, 9 id. 491; *Smith v. State*, 7 Humph. (Tenn.) 43; *State v. Guest*, 6 Ala. 778. False imprisonment is generally understood to include an assault (Id.; *Click v. The State*, 3 Texas, 282. But see *State v. Edge*, 1 Strobb. [S. C.] 91); and the offense is a misdemeanor, not a felony. *People v. Ebner*, 23 Cal. 158. See, as to Texas, *Redfield v. The State*, 24 Texas, 138. Under Illinois statute, *Slomer v. People*, 25 Ill. 70.

(707) False imprisonment is always included in the offense of kidnapping (*Click v. State*, 3 Texas, 282); and to complete the offense transportation to a foreign country is not necessary. *State v. Rollins*, 8 N. H. 550.

Also, by "The Merchant Shipping Act, 1854," the offence of deserting or leaving seamen abroad has been specially provided for—each of the acts under-mentioned being thereby constituted a misdemeanor:—

1. If the master or any other person belonging to any British ship wrongfully forces on shore and leaves behind, or otherwise wilfully and wrongfully leaves behind in any place on shore or at sea, in or out of her majesty's dominions, any seaman or apprentice belonging to such ship before the completion of the voyage for which such person was engaged, or the return of the ship to the United Kingdom (x).

2. If the master of a British ship: (1) Discharges any seaman or apprentice in any place situate in any British possession abroad (except the possession in which he was shipped), without previously obtaining the sanction in [* 251] * writing, indorsed on the agreement of some public shipping master, or other officer duly appointed by the local government in that behalf, or (in the absence of any such functionary) of the chief officer of customs, resident at or near the place where the discharge was made: (2) Discharges any seaman or apprentice at any place out of her majesty's dominions, without previously obtaining the sanction, so indorsed as aforesaid, of the British consular officer there, or (in his absence) of two respectable merchants resident there: (3) Leaves behind any seaman or apprentice at any place situate in any British possession abroad, on any ground whatever, without previously obtaining a certificate in writing, so indorsed as aforesaid, from such officer or person as aforesaid, stating the fact and the cause thereof, whether such cause be unfitness or inability to proceed to sea, or desertion, or disappearance: (4) Leaves behind any seaman or apprentice at any place out of her majesty's dominions on shore or at sea, on any ground whatever, without previously obtaining the certificate, indorsed in manner and to the effect last aforesaid, of the British consular officer there, or (in his absence) of two respectable merchants, if there is any such at or near the place where the ship then is (y).

Falling within the class of offences under our notice may be specified the following, of which the first-mentioned is a felony, and the second a misdemeanor:—

1. The unlawfully, either by force or fraud, taking or enticing away, or detaining any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such [* 252] child, of the possession thereof, or with intent to * steal any article upon or about the person of such child, and the receiving or harbouring such child, with a like intent, knowing the same to have been, by force or fraud, so taken, or enticed away, or detained (z).

(x) 17 & 18 Vict. c. 104, s. 206.

(y) 17 & 18 Vict. c. 104, s. 207. Under this section the functionaries and merchants mentioned in it are empowered to examine in a summary way into the grounds of the proposed discharge; and by s. 208, proof of the required sanction or certificate will be on the accused.

The punishment (fine or imprisonment) of

any offence declared to be a misdemeanor by the above act, is minutely regulated by s. 518.

(z) 24 & 25 Vict. c. 100, s. 56. Punishment: penal servitude for any term not exceeding seven years nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

The consent of a child of very tender years will not avail as a defense in a prosecution for the crime of kidnapping. See *Com. v. Nickerson*, 5 Allen (Mass.), 518, 527; *State v. Farrar*, 41 N. H. 58; *State v. Rollins*, 8 id. 550; *Com. v. Robinson*, Thacher's Crim. Cas. 488.

2. The unlawfully taking, or causing to be taken, any unmarried girl, under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her (a).

VIII. Of offences against the female part of her majesty's subjects, that attended with the greatest aggravation is the crime of rape, *raptus mulierum*, or the "carnal knowledge" (b) of a woman forcibly and against her will. This by the Jewish law (c), was punished with death, in case the damsel was betrothed to another man; and in case she was not betrothed, then a heavy fine of fifty shekels was to be paid to the damsel's father, and she was to be the wife of the ravisher all the days of his life; without that power of divorce, which was in general permitted by the Mosaic law.

The civil law (d) punished with death and confiscation of goods the crime of ravishment: under which it included the offence of forcible abduction, or taking away a woman from her friends: and also the present offence of forcibly dishonouring her; either of which, without the other, was in that law sufficient to constitute a capital crime. Also the stealing away a woman from her parents or guardians, and debauching her, was equally penal by * the emperor's edict, whether she consented or was forced: [** 253*] "*sive volentibus, sive nolentibus, mulieribus, tale facinus fuerit perpetratum.*" And this, in order to take away every opportunity of offending in this way from women whom the Roman law supposed never to go astray, without the seduction and arts of the other sex: and therefore, by restraining and making so highly penal the solicitations of the men, they meant to secure effectually the honour of the women. "*Si enim ipsi raptores metu, vel atrocitate pœnas, ab hujusmodi facinore se temperaverint, nulli mulieri, sive volenti, sive nolenti, peccandi locus relinquetur; quia hoc ipsum velle mulierum, ab insidiis nequissimi hominis, qui meditatur rapinam, inducitur. Nisi etenim eam sollicitaverit, nisi odiosis artibus circumvenierit, non faciet eam velle in tantum dedecus sese prodere.*" But our English law does not entertain quite such sublime ideas of the honour of either sex, as to lay the blame of a mutual fault upon one of the transgressors only: and therefore makes it a necessary ingredient in the crime of rape, that it be against the woman's will (e).

Rape was punished by the Saxon laws, particularly those of King Athelstan (f), with death: which was also agreeable to the old Gothic or Scandinavian constitution (g). But this was afterwards thought too hard: and in its stead another severe but not capital punishment was inflicted by William the Conqueror; viz. castration and loss of eyes (h); which continued till after Bracton wrote, in the reign of Henry the Third. But in order to prevent malicious accusations, it was then the law, that the woman should immediately after, "*dum recens fuerit maleficium,*" go to the next town, and there make discovery to some credible persons of the injury she had suffered; and

(a) 24 & 25 Vict. c. 100, s. 55. Punishment: imprisonment for not more than two years, with or without hard labour.

(b) As to the definition of which, see the stat. 24 & 25 Vict. c. 100, s. 63.

(c) Deut. xxii. 25.

(d) Cod. 9, tit. 13.

(e) See *Reg. v. Camplin*, 1 Den. 69; *Reg. v. Case*, Id. 580; *Reg. v. Fletcher*, 1 L. R. C. C. 89.

(f) Bracton, l. 3, c. 28.

(g) Stiernh. de Jure Sueon. l. 3, c. 2.

(h) Leg. Gul. Conq. c. 19.

[* 254] afterwards should acquaint the high * constable of the hundred, the coroners, and the sheriff with the outrage (i); though afterwards, by statute Westm. 1, c. 13, the time of limitation in England was extended to forty days. At present there is no time of limitation fixed: for, as rape is usually now punished on indictment at the suit of the crown, the maxim of law takes place, that *nullum tempus occurrit regi*: but the jury will rarely give credit to a stale complaint. During the former period also, it was held for law (k), that the woman (by consent of the judge and her parents) might redeem the offender from the execution of his sentence, by accepting him for her husband; if he also was willing to agree to the exchange, but not otherwise.

In the 3 Edw. 1, by the statute Westm. 1, c. 13, the punishment of rape was much mitigated; the offence itself of ravishing a damsel within twelve years of age, either with her consent or without, or of any other woman against her will, being reduced to a trespass, if not prosecuted by appeal within forty days, and subjecting the offender only to two years' imprisonment, and a fine at the king's will. But this lenity being productive of bad consequences, it was ten years afterwards, in 13 Edw. 1, deemed necessary to make the offence of forcible rape felony by statute Westm. 2, c. 34. And by statute 18 Eliz. c. 7, it was made felony without benefit of clergy.

Rape continued to be punishable with death until the year 1841 (l), when for the capital punishment was substituted transportation, and now the 24 & 25 Vict. c. 100, s. 48, enacts that, whosoever shall be convicted of the crime of rape, shall be guilty of felony, and liable to be kept in penal servitude for life, or for any term not less than five (m) years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

A male infant, under the age of fourteen years, is * presumed by [* 255] law physically incapable of committing a rape, and therefore cannot be found guilty of it. For though in some cases *malitia supplet aetatem*, yet, as to this particular species of felony, the law supposes an imbecility of body as well as mind (n). (708)

The civil law seems to suppose a prostitute or common harlot incapable of any injuries of this kind (o): not allowing any punishment for violating the chastity of her, who has indeed no chastity at all, or at least has no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment. It therefore holds it to be felony to force even a concubine or harlot; because the woman may have forsaken that unlawful course of life (p); and, as Bracton well observes (q), "*licet meretrix fuerit antea, certe tunc temporis non fuit, cum reclamando nequitia ejus consentire noluit.*" (709)

(i) Glan. l. 14, c. 6; Bract. l. 8, c. 28.

(k) *Id.*

(l) See stat. 4 & 5 Vict. c. 56, s. 3.

(m) See 27 & 28 Vict. c. 47, s. 2.

(n) 1 Hale, P. C. 631.

(o) Cod. 9, 9, 22; Dig. 47, 2, 39.

(p) 1 Hale, P. C. 629; 1 Hawk. P. C. 108.

(q) Fol. 147.

(708) See *ante*, 333, note 607. See, also, *Nugent v. State*, 18 Ala. 521; *State v. Sam, Winston* (N. C.), 300.

(709) See *Pleasant v. The State*, 15 Ark. 624; *Wright v. The State*, 4 Humph. (Tenn.) 194, which hold that the offense may be committed on a common prostitute as well as on any other female.

As to the material facts requisite to be given in evidence and proved upon an indictment of rape, they are of such a nature, that though necessary to be known and settled, for the conviction of the guilty and preservation of the innocent, and therefore to be found in such criminal treatises as discourse of these matters in detail, yet they ought not to be publicly discussed, except in a court of justice. I shall therefore merely add upon this head a few remarks from sir Matthew Hale, with regard to the competency and credibility of witnesses, which may, *salvo pudore*, be considered.

And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: if * the witness be of good [* 256] fame (*r*); if she presently discovered the offence (*s*), and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong though not conclusive, presumption that her testimony is false or feigned. (710)

Moreover, if the rape were committed on an infant she may still be a competent witness, if she has sense and understanding enough to know the nature and obligations of an oath; or even to be sensible of the wickedness of telling a deliberate lie (*t*). But no hearsay evidence can be given of the declarations of a child who has not capacity to be sworn, nor can such child be examined in court without oath (*u*); and there is no determinate age, at which the oath of a child ought either to be admitted or rejected. Yet, where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact deposed to; and [* 257] that the conviction should not * be grounded singly on the unsupported accusation of an infant under years of discretion. There may

(*r*) In order to shake the credibility of the prosecutrix's testimony, her character for chastity may be impeached by general evidence; but evidence of particular facts for this purpose is inadmissible, and the woman is not compelled to answer whether she had not had connexion with other men, or with a particular person named. *R. v. Hodgson*,

Russ. & Ry. C. C. 211; *R. v. Martin*, 6 C. & P. 562.

(*s*) See 1 East, P. C. 445.

(*t*) When the child does not sufficiently understand the nature and obligation of an oath, will the judge put off the trial, for the child to be instructed in the meantime? See Best. Evid. 4th ed. 222.

(*u*) *R. v. Brazier*, 1 East, P. C. 444.

(710) See *People v. Hulse*, 3 Hill, 309. Where the prosecutrix did not disclose the offense till interrogated, and continued her intercourse with the defendant after the act, this was held not enough for conviction. *Whitney v. State*, 35 Ind. 503. See *Barney v. People*, 22 Ill. 160; *People v. Benson*, 6 Cal. 221; *State v. Lattin*, 29 Conn. 389; *Leoni v. State*, 44 Ala. 110; *Thompson v. State*, 38 Ind. 89; *State v. Shuttleworth*, 18 Minn. 209; *Smith v. State*, 47 Ala. 540.

The crime of rape is held not to be committed where the will of the woman is overcome by fraud or persuasion. See *Lewis v. State*, 30 Ala. 54; *Don Moran v. People*, 25 Mich. 356; *Wyatt v. State*, 2 Swan. (Tenn.) 394. But see *State v. Shepard*, 7 Conn. 54. It is otherwise, however, where consent is induced by fear of personal violence. *Wright v. The State*, 4 Humph. (Tenn.) 194; *Pleasant v. The State*, 8 Eng. (Ark.) 360.

be therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible, or such as the jury is bound to believe. For one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact.

"It is true," says a learned judge (*x*), "that rape is a most detestable crime, and therefore ought severely and impartially to be punished; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent." He then relates two extraordinary cases of malicious prosecution for this crime, that had happened within his own observation; and concludes thus: "I mention these instances, that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and vigilance; the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony of sometimes false and malicious witnesses."

The following offences against females—of which the first is a felony, and the three last are misdemeanors—are respectively made punishable by statute (*y*), as undermentioned: the unlawfully and carnally knowing and abusing any girl under the age of ten years (*z*), or above the age of ten and under the age of [* 258] twelve years (*a*); any indecent * assault upon a female, or attempt to have carnal knowledge of a girl under twelve years of age (*b*); and the procuring, by false pretences, false representations, or other fraudulent means, a woman or girl under the age of twenty-one years, to have illicit carnal connexion with a man (*c*). (711)

The offence next to be noticed likewise relates to the female part of her majesty's subjects, being that of the forcible abduction and marriage of a woman, which is vulgarly called stealing an heiress; this is provided for by the statute just now cited, the 24 & 25 Vict. c. 100, of which sect. 53 enacts that, where any woman of any age has any interest, legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or is a presumptive heiress or coheiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest; whosoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; and whosoever shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other

(*x*) 1 Hale, P. C. 635.

(*y*) 24 & 25 Vict. c. 100.

(*z*) *Id.* s. 50. Punishment: penal servitude for life, or for not less than five years; or imprisonment for not more than two years, with or without hard labour.

An attempt to commit the above felony may be where the girl consents. *Reg. v. Beale*, 1 L. R. C. C. 10.

(*a*) Sect. 51. Punishment: penal servitude

for five years; or imprisonment for not more than two years, with or without hard labour.

The above enactment does not take away the power of assenting to an indecent assault. *Reg. v. Johnson*, L. & C. 632.

(*b*) Sect. 52. Punishment: imprisonment for not more than two years, with or without hard labour.

(*c*) Sect. 49. Punishment: imprisonment for not more than two years, with or without hard labour.

(711) In most, if not in all, of the States, these offenses have been made the subject of statute regulation. See *Dennis v. The State*, 5 Pike (Ark.), 230; *Com. v. Bennet*, 2 Va. Cas. 235; *Com. v. Fields*, 4 Leigh (Va.), 648. But see *Smith v. The State*, 12 Ohio St. 466, 474.

person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony (*d*). And by the same section it is further enacted * that any one convicted of an offence against its provisions [* 259] shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she shall have any such interest, or which shall come to her as such heiress, coheiress, or next of kin as aforesaid; and if any such marriage as aforesaid shall have taken place, such property shall, upon such conviction, be settled in such manner as the Court of Chancery shall upon information at suit of the attorney-general appoint.

An indictment framed upon the above enactment must allege that the taking was for lucre, but the motive may be presumed from the interest mentioned in the indictment. It must appear that the woman was taken away against her will. And though possibly the marriage or defilement might be by her subsequent consent, being won thereunto by flatteries after the taking, yet this is felony, if the first taking were against her will; and so *vice versa*, if the woman be originally taken away with her own consent, yet if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly be said to be taken against her will, as if she never had given any consent at all; for till the force was put upon her, she was in her own power (*e*). A woman, thus taken away and married, may be sworn and give evidence against the offender, though he is her husband *de facto*; contrary to the general rule of law; because he is no husband *de jure*, in case the actual marriage was also against her will. Lastly, the intent laid in the indictment may be proved by the acts or declarations of the defendant, or may be inferred from other circumstances (*f*).

Another offence, differing from the above, is that of forcibly taking away or detaining against her will, a * woman, of any age, with intent to [* 260] marry or carnally know her, or to cause her to be married or carnally known by any other person; this is a felony, and punishable as below mentioned (*g*).

The attempting by injurious means to procure abortion is likewise criminal and indictable, for it is enacted:

1. That any woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever, with the like intent, shall be guilty of felony (*h*).

(*d*) Punishment: penal servitude for any term not exceeding fourteen nor less than five years; or imprisonment for not more than two years, with or without hard labour. See *Reg. v. Burrell*, L. & C. 354; *R. v. Wakefield*, Townsend, St. Tr. ii. 112; 2 Lewin, C. C. 1; where the parties were indicted for and convicted of a conspiracy to commit a violation of the repealed stats. 3 Hen. 7, c. 2, and 4 & 5 Ph. & M. c. 8.

(*e*) *Reg. v. Swendsen*, 14 St. Tr. 559.

(*f*) See *Reg. v. Barratt*, 9 C. & P. 387.

(*g*) 24 & 25 Vict. c. 100, s. 54. Punishment: penal servitude for not more than fourteen years nor less than five years,—or imprisonment for not more than two years, with or without hard labour.

(*h*) 24 & 25 Vict. c. 100, s. 58. Punishment: penal servitude for life, or for not less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

2. That whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor (1).

IX. What has been before observed (k), with regard to the manner of proof, upon a charge of rape, which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offence, of IX. Unnatural crimes. [* 261] * a still deeper malignity; the infamous crime against nature, committed either with man or beast. A crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.

I will not act so disagreeable a part, to my readers as well as myself, as to dwell upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named; "*peccatum illud horribile, inter christianos non nominandum*" (l). A taciturnity observed likewise by the edict of Constantius and Constans (m), "*ubi scelus est id, quod non proficit scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis poenis subdantur infames, qui sunt, vel qui futuri sunt rei.*"

Our ancient law commanded such miscreants to be burnt to death; though Fleta says they should be buried alive; either of which punishments was indifferently used for this crime among the ancient Goths.

But the penalty assigned to it, committed either with mankind or with any animal, is now penal servitude for life, or for any term not less than ten years (n). And an attempt to commit this crime, or an assault with intent to commit it, or an indecent assault upon any male person, is a misdemeanor, punishable with penal servitude for any term not exceeding ten, nor less than five years, * or imprisonment for any term not exceeding two years, [* 262] with or without hard labour (o).

And thus much for offences which more immediately affect the persons of individuals.

(1) Sect. 59. Punishment: penal servitude for five years,—or imprisonment for not more than two years, with or without hard labour. See *Reg. v. Isaac*, L. & C. 220; *Reg. v. Hillman*, Id. 348.

(k) *Ante*, p. 257.

(l) See in Rot. Parl. 50 Edw. 8, n. 58, a complaint, that a Lombard did commit the sin, "that was not to be named." 12 Rep. 87.

(m) Cod. 9, 9, 81.

(n) 24 & 25 Vict. c. 100, s. 61.

The rule of law in regard to the above offence is, that if both parties concerned therein are arrived at years of discretion, *agentes et consentientes pari poenâ plectantur*; but if committed on a boy under fourteen, it is felony in the agent only, 1 Hale, P. C. 470; 3 Inst. 59.

(o) 24 & 25 Vict. c. 100, s. 62

* CHAPTER XIV.

[* 263]

OFFENCES AGAINST PROPERTY.

OFFENCES against the property of individuals, like those directed against the person, are now mainly indicated and made punishable by statute (*a*), recourse, however, being still needed, in respect of matters about which the legislature has been silent, to the customary law. In the offences here to be considered the principal ingredients are malice and fraud, often accompanied by force. Proof that an act was done maliciously or fraudulently has been much facilitated by various statutory provisions which will from time to time be specified *in notis*. Offences falling within the scope of this chapter will be treated of in the following order: the maliciously setting fire to buildings and other things, burglary and housebreaking, simple, aggravated, and compound larceny, embezzlement, fraud, and false * pretences, for- [* 264] gery, malicious injuries to property not previously noticed, and conspiracy to commit certain crimes.

I. Arson (*b*) is, at common law, the malicious and wilful burning of the house or out-house of another man. This is an act of very great malignity:

I. Arson. because, first, it is an offence against that right of habitation, which is acquired by the law of nature as well as by the laws of society: next, because of the terror and confusion that necessarily attend it: and, lastly, because it wastes the substance of the community—in simple theft, of which we shall hereafter speak, the thing stolen only changes its master, but still remains *in esse* for the benefit of the public, whereas by burning the thing itself is absolutely destroyed. This crime may also be more destructive than murder itself: since murder, atrocious as it is, seldom extends beyond the felonious act designed; whereas fire may involve in a common calamity persons unknown to the incendiary, and not intended to be hurt by him—friends as well as enemies. For which reason the civil law (*c*) punished with death such as maliciously set fire to houses in towns, and contiguous to others; but was more merciful to such as only fired a cottage, or house, standing by itself.

Our customary law distinguished with much nicety upon this crime, holding that not only the bare dwelling-house, but all out-houses parcel thereof, though not contiguous thereto, nor under the same roof, as barns and stables, might be the subject of arson (*d*). The common law also accounted it felony to burn a single barn in the field, if filled with hay or corn, though not parcel

(*a*) The statutes principally cited throughout this chapter are:—the act concerning malicious injuries to property (24 & 25 Vict. c. 97); the act concerning larceny and other similar offences (24 & 25 Vict. c. 96); and the act concerning forgery (24 & 25 Vict. c. 98).

By ss. 73, 117, and 51 respectively of the above statutes, it is enacted that when any person has been convicted of an indictable misdemeanor under either act, the court may, in addition to or in lieu of any of the punishments thereby authorised, fine the offender, and require him to enter into his own

recognizances and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under such act, the court may require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment authorised by it: provided that no person be thus imprisoned for not finding sureties for any period exceeding one year.

(*b*) *Ab ardendo*.

(*c*) Dig. 48, 19, 28, 12.

(*d*) 1 Hale, P. C. 567.

of the dwelling-house (e). And many distinctions are to be met with in our books, concerning what would or would not amount to arson; cases such as alluded to, seem now, however, to be rendered almost useless by various [* 265] * provisions of the statute 24 & 25 Vict. c. 97, which make felonious each of the acts next mentioned when done unlawfully and maliciously (f). The setting fire to (1.) any dwelling-house, any person being therein (g), or (2.) any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, storehouse, granary, hovel, shed, or fold, or to any farm building, or to any building or erection used in farming land, [* 266] or in * carrying on any trade or manufacture, or any branch thereof, whether the same be in the possession of the offender or of any other person, with intent thereby to injure or defraud any person (h); or (3.) any station, engine-house, warehouse, or other building appertaining to any railway, port, dock, harbour, canal, or other navigation (i); or (4.) any building other than any church or place of divine worship (j), or any public building (k), such as above-mentioned (l).

As to what was said to be a burning, so as to amount to arson, a bare intent, or attempt to do it, by actually setting fire to a house, unless it absolutely burned, was held not to fall within the description of *incendit et combussit*;

(e) 8 Inst. 69.

(f) As to the significance of the words "wilfully and maliciously," see *R. v. Farrington*, Russ. & Ry. 207, decided under the 43 Geo. 3, c. 58, which made felonious the "wilfully, maliciously, and unlawfully setting fire to any mill, with intent to injure or defraud any one." There, at the trial, the case had been in other respects satisfactorily proved against the prisoner; but no evidence had been adduced to show that his intent was such as specified in the act, and sentence was respite until the opinion of the judges could be taken upon this question—whether, under the particular words of the statute above set out, the intent to injure or defraud some person was not necessary to be proved, or at least some fact from which such intent could be inferred, beyond the mere act of setting the mill on fire? It was held that the intent specified need not otherwise be proved, because a person who does an act wilfully necessarily intends that which must be the consequence of the act, and in the case put the accused had therefore in legal contemplation intended to injure the owner of the premises which were burned. *R. v. Farrington* accordingly shows that if proof be given that an act such as there in question was done wilfully, and not done under circumstances which would excuse or justify it, such proof will substantiate an allegation of malice and of an intent to injure. We may add that by sect. 58 of the stat. 24 & 25 Vict. c. 97, every punishment and forfeiture by that act imposed on any person maliciously committing an offence punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence be committed from malice conceived against the owner of the property in respect of which it be committed or otherwise. See *R. v. Salmon*, Russ. & Ry. 26.

(g) Sect. 2. Punishment: penal servitude for life or for not less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping. See *Reg. v. Fletcher*, 2 C. & K. 215. The like punishment is by s. 9 awarded to the offence of unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroying or damaging a dwelling-house, any person being therein, or any building whereby the life of a person shall be endangered, which is felony.

(h) Sect. 8. Punishment *ut supra*. The above and any other similar provision of the said statute applies, although the offender be in possession of the property against or in respect of which such act may be done (sect. 59). Also it shall be sufficient in an indictment for any offence against the above act, where it may be necessary to allege an intent to injure or defraud, to allege that the party accused did the act with intent to injure or defraud (as the case may be), without alleging an intent to injure or defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud (s. 60).

(i) Sect. 4. Punishment *ut supra*.

(j) *Ante*, p. 166.

(k) *Ante*, p. 133.

(l) Sect. 6. Punishment: penal servitude for not more than fourteen years nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

which were words necessary, in the days of law-latin, to all indictments of this sort. But the burning and consuming of any part of a dwelling-house was accounted sufficient, though the fire were afterwards extinguished (*m*), to satisfy the allegation. Any such question is now, however, less likely than formerly to arise, inasmuch as the 24 & 25 Vict. c. 97, enacts, that the unlawfully and maliciously setting fire to anything, being in, against, or under any building, under such *circumstances that if the building were thereby [*267] set fire to, the offence would amount to felony, shall be felony (*n*); and the unlawfully and maliciously attempting by any overt act to set fire to any building, or thing, so situated as just mentioned, under such circumstances that if the same were thereby set fire to the offender would be guilty of felony, is likewise felony (*o*).

In order to constitute the crime of arson, the burning must be malicious; and therefore no burning by negligence or mischance amounts to it. But by statute 6 Ann. c. 31, any servant, negligently setting fire to a house or out-houses, shall forfeit 100*l*. or be sent to the house of correction for eighteen months (*p*): in the same manner as the Roman law directed, *eos, qui negliger ignes apud se habuerint, fustibus vel flagellis cædi* (*q*).

The punishment of arson was death by our ancient Saxon laws (*r*). And in the reign of Edward I. this sentence was executed by a sort of *lex talionis*; for incendiaries were burnt to death (*s*): as they also were by the Gothic constitutions (*t*). The statute 8 Hen. 6, c. 6, made the wilful burning of houses, under some special circumstances therein mentioned, amount to the crime of high *treason. But it was again reduced to felony by the general [*268] acts of Edward VI. and queen Mary (*u*); and now the punishment of arson, no longer capital, is left, as already shown, to be awarded within certain limits, according to the discretion of the Court. (712)

(*m*) 1 Hawk. P. C. 105.

(*n*) Sect. 7. Punishment: penal servitude for not more than fourteen nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping. By s. 10 the unlawfully and maliciously placing or throwing into, against, or near any building any gunpowder or other explosive substance, with intent to destroy or damage any building, or any machinery, tools, fixtures, or chattels, whether or not any explosion take place, or damage be caused thereby, is also a felony punishable as

above, except that the imprisonment may be with or without solitary confinement.

(*o*) Sect. 8. Punishment: penal servitude *ut supra*, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*p*) A similar provision is made within the bills of mortality; 14 Geo. 3, c. 78, s. 86.

(*q*) Dig. l. 15, 4.

(*r*) Leg. Inae, c. 7.

(*s*) Britt. c. 9.

(*t*) Stiernh. de Jure Goth. l. 3, c. 6.

(*u*) *Ante*, p. 95.

(712) It is arson at common law to burn a barn stored with hay or grain (*Sampson v. Com.*, 5 Watts & S. [Penn.] 885); or to set fire to a building that is so near a dwelling-house as to endanger the latter. *Gage v. Shelton*, 3 Rich. (S. C.) 242. See *State v. Terry*, 4 Dev. & Bat. (N. C.) 185; *State v. Stewart*, 4 Conn. 47. But a man cannot commit arson by burning his own house, at common law, even when it is insured. See *Bloss v. Tobey*, 2 Pick. (Mass.) 20, 325; *State v. Tools*, 29 Conn. 342; *Roberts v. State*, 7 Cold. (Tenn.) 359. It is otherwise, however, under the statutes of some of the States. See *State v. Elder*, 21 La. Ann. 157; *Allen v. State*, 10 Ohio St. 289; *Shepherd v. People*, 19 N. Y. (5 Smith) 537; *People v. Hughes*, 29 Cal. 257; *People v. Schwartz*, 32 id. 160; *State v. Hurd*, 51 N. H. 176; *Com. v. Erskine*, 8 Gratt. (Va.) 624.

The least burning of the house completes the offense. Thus, the charring of the floor in a single place, so as to destroy any of the fibres of the wood, is sufficient (*State v. Sandy*, 3

II. Besides the protection which has been thus specifically extended by the legislature to buildings and chattels by the above cited provisions of the statute 24 & 25 Vict. c. 97, the same enactment makes felonious the unlawfully and maliciously setting fire to a crop of hay, corn, or other cultivated vegetable produce, whether standing or cut down, or to any plantation of trees, or any heath or furze, wheresoever the same be growing (x); or to any stack of hay, corn, or other cultivated vegetable produce, or of heath, furze, turf, coals, charcoal, wood, or bark (y).

II. Maliciously setting fire to property, &c.

And the unlawfully and maliciously attempting by any overt act to set fire to any such matter or thing as above mentioned, under such circumstances that if the same were thereby set fire to, the offender would be guilty of felony, is likewise constituted a felony (z).

Also the unlawfully and maliciously setting fire to any mine of coal or other mineral fuel (a), or attempting by any overt act to set fire to any mine, under such circumstances that if the mine were thereby set fire to the offender would be guilty of felony, is made a felony (b).

The following acts, when done unlawfully and maliciously, are also by the same statute made felonious:—the setting fire to, casting away, or destroying

(x) Sect. 15. Punishment: penal servitude for not more than fourteen years nor less than five years,—or imprisonment for not more than two years with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(y) Sect. 17. Punishment: penal servitude for life or not less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(z) Sect. 18. Punishment: penal servitude for not more than seven nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and

with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(a) Sect. 26. Punishment: penal servitude for life or for not less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(b) Sect. 27. Punishment: penal servitude for not more than fourteen nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Ired. [N. C.] 570; *People v. Butler*, 16 Johns. 208; *People v. Cotteral*, 18 id. 115; *Com. v. Betton*, 5 Cush. [Mass.] 427; *State v. Mitchell*, 5 Ired. [N. C.] 350; and it is immaterial how soon the fire is extinguished (*Hester v. State*, 17 Ga. 130); or whether it be put out, or go out of itself. *Com. v. Van Shaack*, 16 Mass. 105, note.

Malice is of the essence of the crime of arson at common law (*Jesse v. State*, 28 Miss. 100); and the same ingredient must enter into offenses of house-burning created by statute. *Ib.* When the building fired is another's, the intent may be inferred from the act (*Com. v. Harney*, 10 Metc. [Mass.] 422); or from threats, etc. *State v. Rohfricht*, 12 La. Ann. 382. But in the statute offense of firing one's own house, with intent to defraud an insurance office, the intent must be substantively proved. *McDonald v. People*, 47 Ill. 533; see *Martin v. State*, 28 Ala. 71.

An attempt to commit arson is an indictable misdemeanor. *Com. v. Flynn*, 8 Cush. (Mass.) 525; *People v. Bush*, 4 Hill, 133.

As to the punishment of arson, reference must be made to the statutes of the various States. See, as to Massachusetts, *Com. v. Wyman*, 12 Cush. 237; District of Columbia, *United States v. White*, 5 Cranch's C. C. 78; South Carolina, *State v. Rosse*, 8 Rich. 276; North Carolina, *State v. Seaborn*, 4 Dev. 305; Virginia, *Com. v. Posey*, 4 Call. 109.

In New York, arson is divided by statute into four degrees. And a person may, by burning his own dwelling-house, be guilty of arson in the first degree. *Shepherd v. People*, 19 N. Y. (5 Smith) 237.

any vessel, whether the same be complete or in an unfinished state (*c*)—the setting fire to, casting away, or destroying any vessel, with intent thereby to prejudice any owner or part owner of such vessel, or of any goods on board the same, or any underwriter of a policy of insurance upon such vessel, or on the freight thereof, or upon any goods on board the same (*d*)—the attempting, by any overt act, to set fire to, cast away, or destroy any vessel, under such circumstances that if the ship or vessel were thereby set fire to, cast away, or destroyed, the offender would be guilty of felony (*e*)—the placing or throwing into, upon, against, or near any vessel, gunpowder, or any other explosive substance, with intent to destroy or damage any vessel, machinery, tools, or chattels, whether or not an explosion take place, and whether or not any injury be effected (*f*)—the damaging, otherwise than by fire, *gunpowder, or other explosive substance, any vessel, whether complete or in an unfinished state, with intent to [*270] destroy the same or render the same useless (*g*).

Such are the malicious injuries to property analogous to arson which are indictable and punishable under the statute law.

III. Burglary, or nocturnal housebreaking, *burgi latrocinium*, which by our ancient law was called *hamesecken*, as it is in Scotland to this day, has always

been looked upon as a very heinous offence: not only because of

III. Burglary. the abundant terror which it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation which every individual might acquire even in a state of nature; an invasion, which in such a state would be sure to be punished with death, unless the assailant were the stronger. But in civil society, the laws come in to the assistance of the weaker party; and, besides that they leave him this natural right of killing the aggressor, if he can (as was shown in a former chapter (*h*)), they also protect and avenge him, in case the might of the assailant is too powerful. And the law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity; agreeing herein with the sentiments of ancient Rome, as expressed in the words of Tully (*i*); "*quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium?*" For this reason no outward doors can in general be broken open to execute any civil process: though, in criminal causes, the public safety supersedes the private. * Hence [*271] also in part arises the animadversion of the law upon nuisances and incendiaries: and to this principle it must be assigned, that a man may assemble people together lawfully (at least if they do not exceed eleven) without

(*c*) Sect. 42. Punishment: penal servitude for life or for not less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping.

As to setting fire to ships of war, *ante*, p. 134.

(*d*) Sect. 43. Punishment *ut supra*.

(*e*) Sect. 44. Punishment: penal servitude for not more than fourteen nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and

with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*f*) Sect. 45. Punishment *ut supra*.

(*g*) Sect. 46. Punishment: penal servitude for not more than seven years nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*h*) *Ante*, p. 213.

(*i*) *Pro Domo*, 41.

danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case (*k*).

The definition of a burglar, as given by sir Edward Coke (*l*), is "he that by night breaketh and entereth into a mansion-house, with intent to commit a felony." In this definition there are four things to be considered; the time, the place, the manner, and the intent.

The time must be by night, and not by day: for in the daytime there is no burglary. We have seen (*m*), in the case of justifiable homicide, how much more heinous all laws made an attack by night than by day; allowing the party attacked by night to kill the assailant with impunity. As to what is reckoned night, and what day, for this purpose: anciently the day was accounted to begin only at sun-rising, and to end immediately upon sun-set; though the better opinion was, that if there were daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it was no burglary (*n*). But all questions as to what constitutes 'the night,' for the purpose of burglary, were set at rest by statute, and now the 24 & 25 Vict. c. 96, enacts (section 1) that for the purposes of the act, which *inter alia* prescribes the punishment for burglary (*o*), the night shall be deemed to commence at nine o'clock in the evening, and to conclude at six o'clock in the morning of the next succeeding day.

As to the place wherein burglary can be committed, it must, at common law, according to sir Edward Coke's definition, be in a mansion-house (*p*): [**272*] and therefore to *account for the reason why breaking open a church is burglary, by the common law, he quaintly observes that it is *domus mansionalis Dei* (*q*). But burglary might also have been committed by breaking the gates or walls of a town in the night (*r*); though that perhaps Sir Edward Coke would have called the mansion-house of the garrison or corporation. Spelman defines burglary to be, "*nocturna diruptio habitaculi, vel ecclesiæ, etiam murorum portarumve burgi, ad feloniam perpetrandam.*" And therefore we may safely conclude that the words *domus mansionalis* are only requisite in defining at common law burglary in a private house: which is the most frequent form of this offence. For no distant barn, warehouse, or the like, was clothed with the same privileges, nor looked upon as a man's castle of defence: nor is the breaking open of a house wherein no man resides, and which, therefore, for the time being is not a mansion-house, attended with the same circumstances of midnight terror (*s*).

A house wherein a man sometimes resides, and which the owner has only left for a short season, *animo revertendi*, may be the object of burglary, though no one be in it at the time of the fact committed (*t*). There mere casual use, however, of a tenement, will not suffice; and, therefore, the circumstance of a servant sleeping in a barn, or porter in a warehouse, for particular and temporary purposes, will not so operate as to make a violent entry in the night, in order to steal, a burglary (*u*).

(*k*) 1 Hale, P. C. 547; *ante*, p. 163.

(*l*) 3 Inst. 63.

(*m*) *Ante*, p. 213.

(*n*) 3 Inst. 63; 1 Hale, P. C. 350; 1 Hawk. P. C. 101.

(*o*) Sect. 52; cited *post*.

(*p*) "Every house for the dwelling and habitation of man," observes Lord Coke, "is taken to be a mansion-house, wherein burglary may be committed." 3 Inst. 64.

(*q*) 3 Inst. 64. See 1 Hale, P. C. 556 (*d*). Sacrilege by breaking and entering a church or other place of divine worship is punishable under the 24 & 25 Vict. c. 96, s. 50.

(*r*) Spelm. Gloss. tit. Burglary; 1 Hawk. P. C. 103.

(*s*) 1 Hale, P. C. 559.

(*t*) 1 Hale, P. C. 556; *Fost.* 77.

(*u*) 1 Hale, P. C. 557-8. Nor, though the house is ready for the reception of the owner,

* A chamber in a college or an inn of court, where each inhabitant has a distinct property, is, for all purposes, the mansion-house of the [* 273] owner (*t*). So also is a room or lodging, in any private house, the mansion for the time being of the lodger; if the owner does not himself dwell in the house, or if he and the lodger enter by different outward doors. But if the owner himself sleeps in the house, and has but one outward door at which he and his lodgers enter, such lodgers seem only to be inmates, and all their apartments to be parcel of the one dwelling-house of the owner (*x*). Thus too the house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation, and not of the respective officers (*z*). But if I hire a shop, parcel of another man's house, and work or trade in it, but never sleep there, it is no dwelling-house, nor can burglary be committed therein; for by the lease it is severed from the rest of the house, and therefore is not the dwelling-house of him who occupies the other part: neither can I be said to dwell therein, when I never sleep there (*a*). Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein (*b*); for the law regards thus highly nothing but permanent edifices; a house or church, the wall or gate of a town; and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon under the same circumstances (*c*).

If a barn, stable, or warehouse, were parcel of the * mansion-house, and within the same common fence (*d*), though not under the same [* 274] roof or contiguous, a burglary might at common law have been committed therein; for the capital house was held to protect and privilege all its branches and appurtenants, if within the curtilage or homestall (*e*). But now, by statute, no building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purposes of the act, unless there be a communication between such building and dwelling-house, either immediate, or by means of a covered and enclosed passage leading from the one to the other (*f*).

As to the manner of committing burglary: there must at common law be both a breaking and an entry to complete it. But the breaking and entering need not be both done at once: for if a hole be broken one night, and the breakers enter the next night through it, they are burglars (*g*). There must in general be an actual breaking; not a mere legal *clausum fregit* (by leaping over invisible ideal boundaries, which may constitute a civil process), but a substantial and forcible irruption. As at least by breaking, or taking out the glass of, or otherwise opening, a window (*h*): picking a lock, or opening it

and he has sent his property into it preparatory to his own removal, will it become, for this purpose, his mansion. *R. v. Thompson*, 8 Leach, 771. And where the owner has never, by himself or by any of his family, slept in the house, it is not his dwelling-house, so as to make the breaking thereof burglary, though he has used it for his meals, and all the purposes of his business. *R. v. Martin*, Russ. & Ry. 138; *R. v. Flannagan*, *Id.* 187.

(*d*) 1 Hale, P. C. 558.

(*e*) Kel. 83; 1 Hale, P. C. 556.

(*g*) Foster, 88, 89.

(*a*) 1 Hale, P. C. 558.

(*b*) 1 Hawk. P. C. 104.

(*c*) But it is otherwise if it be a permanent building, though used only for the purposes of the fair. *R. v. Smith*, 1 M. & Rob. 256.

(*d*) *R. v. Garland*, 1 Leach, 144.

(*e*) 1 Hale, P. C. 558; 1 Hawk. P. C. 104.

(*f*) 24 & 25 Vict. c. 96, s. 58.

(*g*) 1 Hale, P. C. 553.

(*h*) Pulling down (or raising) the sash of a window is a breaking, though it has no fastening, and is only kept in its place by the pulley weight; it is equally a breaking, although there is an outer shutter which is

with a key: nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided. But if a person leaves his door [* 275] * or window open, it is his own folly and negligence, and if a man enters thereby it is no burglary: yet, if he afterwards unlocks an inner or chamber door, it is so (i). But to come down a chimney is held a burglarious entry; for that is as much closed as the nature of things will permit (k). So also to knock at the door, and upon opening it to rush in, with a felonious intent: or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house; all these entries have been adjudged burglarious, though there was no actual breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process (l). And so, if a servant opens and enters his master's chamber-door with a felonious design: or if any other person lodging in the same house or in a public inn, opens and enters another's door, with such evil intent, it is burglary (m). Nay, if the servant conspires with a robber, and lets him into the house by night, this is burglary in both (n); for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease, rather aggravates than extenuates the guilt (o). As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient; as to step over the threshold, to [* 276] put a hand or a hook in at a window to draw out goods, * or a pistol to demand one's money, are all of them burglarious entries (p). The entry may be before the breaking, as well as after: for by statute 24 & 25 Vict. c. 96, s. 51, it is enacted that: "Whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary."

As to the intent; it is clear, that to constitute burglary the breaking and entry must be with a felonious intent, otherwise it is only a trespass. And this is so, whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary; whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law,

not put to. *R. v. Haines*, Russ. & Ry. 451; *R. v. Hyams*, 7 C. & P. 441. Where, however, the window is already partly open, the raising it higher, so as to admit a person through it is not a breaking. *Reg. v. Smith*, 1 Mood. 178. And where a window opens upon hinges, and is fastened by a wedge, so that pushing against it will open it, forcing it open by pushing against it is sufficient to constitute a breaking. *R. v. Hall*, Russ. & Ry. 355.

(i) 1 Hale, P. C. 553. The lifting up of the flap of a cellar usually kept down by its own weight, and thereby getting into the house, has been held a sufficient breaking. *R. v. Russell*, 1 Mood. 337.

(k) 1 Hawk. P. C. 102; 1 Hale, P. C. 552. *R. v. Brice*, Russ. & Ry. 450.

(l) 1 Hawk. P. C. 102.

(m) 1 Hale, P. C. 553, 554.

(n) *Cornwall's Case*, 2 Stra. 880; 1 Hale, P. C. 553; 1 Hawk. P. C. 103.

(o) But if a servant, pretending to agree with a thief, open the door and let him in, for the purpose of detecting and apprehending him, this is no burglary, for the door is lawfully open. *R. v. Johnson*, C. & Mar. 218.

(p) 1 Hale, P. C. 555; 1 Hawk. P. C. 103; Fost. 108. So if the prisoner breaks open a shop window, and with his hand takes out goods, the offence is complete. Fost. 107; *R. v. Davis*, Russ. & Ry. 499.

or created so by statute; since the statute which makes an offence felony, gives it incidentally all the properties of a felony at common law (*q*).

Where no actual felony has been committed in the building burglariously entered, the practice is to charge in the indictment that the intent of the accused was to commit murder, larceny, or any specific felony, and from surrounding circumstances this intent may be inferred. Where, however, a felony has actually been committed, the jury will infer the intent to commit it from the fact (*r*).

Thus much for the nature of burglary; which is now *punishable [** 277*] with penal servitude for life, or for any term not less than five years, or with imprisonment for not more than two years with or without hard labour, and with or without solitary confinement (*s*). (713)

(*q*) 1 Hawk. P. C. 105. (*s*) 24 & 25 Vict. c. 96, s. 52. As to fines
(*r*) *Reg. v. Powell*, 2 Den. 408; 2 East, P. and sureties for keeping the peace under the
C. 514; 1 Hale, P. C. 561. above act, see s. 117.

(713) The common-law offense of burglary is the breaking and entering of a dwelling-house in the night-time, with intent to commit a felony therein. *Rez v. Hunson*, 1 Root (Conn.), 59; *Com. v. Newell*, 7 Mass. 247; *State v. Wilson*, Coxe (N. J.), 441.

It is no breaking if one enters through an open door or window. *State v. Boon*, 13 Ired. 244; *State v. Wilson*, Coxe (N. J.), 439; *Com. v. Strupney*, 105 Mass. 588. But if a door be closed, it is not necessary to constitute burglary that it should be latched (*People v. Bush*, 3 Park. 552; *State v. Reid*, 20 Iowa, 413; *Finch v. Com.*, 14 Gratt. [Va.] 643); and if one thrusts himself down the chimney (*State v. Boon*, 13 Ired. [N. C.] 244; *Donohoe v. State*, 36 Ala. 281), or through fraud practiced on the occupant, procures him to open the door, it is a sufficient breaking. *State v. Johnson*, Phillips (N. C.), 186; *Fisher v. State*, 43 Ala. 17; *Ducher v. State*, 18 Ohio, 308; *State v. Mordecai*, 68 N. C. 207. The removal of an iron grating may be burglary as much as opening a window. *People v. Nolan*, 22 Mich. 229. But it is held that removing a loose plank in a partition wall is not a breaking. *Com. v. Trimmer*, 1 Mass. 476.

To constitute burglary it is not necessary for the whole physical frame to pass within the dwelling-house. If the hand only (*Fisher v. State*, 43 Ala. 17), or the instrument with which it is intended to commit the felony goes within, it is sufficient. *State v. McCall*, 4 Ala. 643. So, merely entering the chimney is sufficient, though the burglar should not pass out of the chimney into any room. *Donohoe v. The State*, 36 Ala. 281. And if a guest at an inn leaves his own room and breaks into the room of another guest, to commit a felony there, it is burglary. *State v. Clark*, 43 Vt. 629. See *State v. Moore*, 13 N. H. 42; *People v. Bush*, 3 Park. 552; *Mason v. People*, 26 N. Y. (12 Smith) 200.

To constitute a burglary, the breaking and entering must be into the dwelling-house of another; that is, the place must be one which is used for habitation. See *State v. Warren*, 33 Me. 30; *Com. v. Barney*, 10 Cush. (Mass.) 478; *People v. Stickman*, 84 Cal. 242; *Hollister v. Com.*, 60 Penn. St. 103. It is not essential, however, that any one should be actually within the house at the time the offense is committed. *State v. Meershouse*, 34 Mo. 344; *Com. v. Brown*, 3 Rawle (Penn.), 207; *Ex parte Vincent*, 26 Ala. 145. And a burglary may be committed in a house or shop within the curtilage of a residence. See *State v. Mordecai*, 68 N. C. 207; *Fisher v. State*, 43 Ala. 17; *People v. Snyder*, 2 Park. 23; *State v. Langford*, 1 Dev. (N. C.) 253. So, of a barn not separated from the residence by a public way *Pitcher v. People*, 16 Mich. 142. And see *State v. White*, 4 Jones (N. C.), 349; *State v. Twitty*, 1 Hayw. (N. C.) 102; *Armour v. State*, 8 Humph. (Tenn.) 879; *State v. Wilson*, 1 Hayw. (N. C.) 242. But it is not burglary to break the door of a store within three feet of the dwelling-house, and inclosed in the same yard, if the store is not necessary to the house as a dwelling (*State v. Langford*, 1 Dev. [N. C.] 253); and see *State v. Ginns*, 1 Nott & M. (S. C.) 583; *People v. Parker*, 4 Johns. 424. Separate and permanent apartments in a house, occupied by a lodger or family, constitute the dwelling-house of such lodger or family. *Com. v. Bowden*, 14 Gray (Mass.), 103; *Dale v. State*, 27 Ala. 81.

The breaking and entering must be with an intent to commit a felony (*Anonymous*, Dalison, 22; *State v. Wilson*, Coxe [N. J.], 439; *State v. Eaton*, 8 Harr. [Del.] 554); and if the

IV. Closely allied to the crime of burglary, as defined by the common or the statute law is that of entering a dwelling-house in the night, with intent to commit any felony thereon, which is constituted a felony (t).

IV. Housebreak-
ing, &c.

The under-mentioned offences are likewise felonies:—

1. The breaking and entering any dwelling-house, schoolhouse, shop, warehouse, or counting-house, and committing a felony therein, or committing a felony therein and breaking out of the same (u).

2. The breaking and entering any building, and committing a felony therein, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof (x), or being in any such building committing a felony therein, and breaking out of the same (y).

3. The breaking and entering any dwelling-house, church, or place of divine worship, or any building within the curtilage, schoolhouse, shop, warehouse, or counting-house, with intent to commit a felony therein (z).

[*278] * And it is further provided, that any one found by night armed with any dangerous or offensive weapon or instrument, with intent to break or enter into a dwelling-house or other building and to commit a felony therein—or found by night having in his possession without lawful excuse (the proof of which excuse shall lie on him) any picklock key or other implement of housebreaking—or found by night having his face blackened or otherwise disguised with intent to commit a felony—or found by night in any dwelling-house or other building with intent to commit a felony therein—shall be guilty of a misdemeanor (a).

(t) 24 & 25 Vict. c. 96, s. 54. Punishment: penal servitude for any term not more than seven nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

(u) Sect. 56. Punishment: penal servitude for not more than fourteen nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

(x) *Ante*, p. 274.

(y) Sect. 55. Punishment: *ut supra*.

(z) Sect. 57. Punishment: penal servitude for not more than seven nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

(a) 24 & 25 Vict. c. 96, s. 58. Punishment: penal servitude for five years,—or imprisonment for not more than two years, with or without hard labour.

object is the commission of a misdemeanor merely, as the cutting off of a person's ear (*Com. v. Newell*, 7 Mass. 247), there is no burglary. *Id.* And see *State v. Cooper*, 16 Vt. 551; *Com. v. Taylor*, 5 Binney (Penn.), 281. Whether the felonious intent be executed or not, is, however, immaterial. *Olive v. State*, 5 Bush (Ky.), 876; *State v. McDaniel*, Winston (N. C.), 249.

The breaking and entering must be both in the night time, which is held to extend from the termination of daylight, beginning at the time when the countenance ceases to be reasonably discerned and extending to the earliest dawn of the next morning. See *State v. Bancroft*, 10 N. H. 105; *People v. Griffin*, 19 Cal. 578; 2 Whart. Cr. Law, § 1594. Light reflected from the moon is not to be taken into the account. 5 How. (Miss.) 20. The rule as to time has been modified by statute in some of the States, as well as in England; and when a statute exists, it is sufficient to aver the offense to be committed in the night time generally. See *People v. Burgess*, 35 Cal. 115; *State v. Robinson*, 35 N. J. L. 71; *Com. v. Williams*, 2 Cush. (Mass.) 582. The question of time is one for the jury. *State v. Leaden*, 35 Conn. 515. See *State v. Bancroft*, 10 N. H. 105; *State v. White*, 4 Jones (N. C.), 849.

An attempt to commit a burglary is an offense at common law. *Hackett v. Com.*, 3 Harris (Penn.), 95.

In the construction of the various statutory provisions in the several States, against breaking into shops and other buildings, the analogies of the common law of burglary are followed. See *Wilson v. State*, 24 Conn. 57; *State v. Newbegin*, 25 Me. 500; *Ducher v. State*, 18 Ohio, 808; *Com. v. Lindsey*, 10 Mass. 153.

Larceny (or theft), by contraction for *latrocinium*, *latrocinium*, may be distinguished into three sorts: simple larceny (*b*), or plain theft unaccompanied with any other atrocious circumstance; aggravated larceny; and mixed or compound larceny; upon each of which offences I shall remark in the order specified.

V. Simple larceny is the felonious taking, and carrying away, of the personal goods of another with intent to deprive the owner permanently of his property therein. This offence certainly commenced then, whenever it was, that the bounds of property, or laws of *meum* and *tuum*, * were established. How far such an offence can exist in a state of [*279] nature, where all things are held to be common, is a question that may be solved with very little difficulty. The disturbance of any individual, in the occupation of what he has seized to his present use, seems to be the only offence of this kind incident to such a state. But unquestionably, in social communities, when property is established, any violation of that property is subject to be punished by the laws of society. At present we will examine the nature of theft, or simple larceny, as laid down in the foregoing definition.

To constitute larceny there must be a taking. This implies the consent of the owner to be wanting. Therefore no delivery of goods by their owner to the offender, upon trust, can ground a larceny at common law. If A lends B a horse, and B rides away with it; or, if I send goods by a carrier, and he carries them away; these are no larcenies at common law (*c*). But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, these are larcenies (*d*): for here the *animus furandi* is manifest; since in the first case he had otherwise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect. But bare non-delivery will not, of course, be intended to arise from a felonious design: since that may happen from a variety of other accidents. Neither by the common law was it larceny in a servant to run away with the goods committed to him to keep, but only a breach of civil trust. Though if he had not the possession, but only the care and oversight of the goods, as the butler of plate, the shepherd of sheep, and the like, the fraudulent conversion of them would be felony at common law (*e*). So if a guest robs his inn or tavern of a piece of plate, it is larceny; * but he has not the possession delivered [*280] to him, but merely the use (*f*).

The rule of our customary law, that a taking or trespass was needed as an ingredient in larceny, led to many nice distinctions (*g*), *ex. gr.*, where a constructive possession of the thing charged to have been stolen remained in the

And whosoever is convicted of any such misdemeanor as above-mentioned, committed after a previous conviction, either for felony or such misdemeanor, will on such subsequent conviction be liable to penal servitude for not more than ten nor less than five years,—or imprisonment for not more than two years, with or without hard labour. S. 59.

(b) Simple larceny was formerly subdivided into grand and petit larceny, the stealing of goods above the value of twelve-pence, was called grand larceny; of goods to that value,

or under it, was petit larceny. Now, however, the distinction between grand and petit larceny is abolished, for “every larceny whatever be the value of the property stolen, shall be deemed to be of the same nature.” 24 & 25 Vict. c. 96, s. 2.

(c) 1 Hale, P. C. 504.

(d) 3 Inst. 107.

(e) 1 Hale, P. C. 506.

(f) 1 Hawk. P. C. 90.

(g) See *Reg. v. Thistle*, 1 Den. 502; *Reg. v. Cohen*, 2 Den. 245

owner, its actual possession having been parted with, or where possession of a chattel had been originally obtained by the accused under colour of a contract, but nevertheless *animo furandi* and in pursuance of a fraud. Hence it was deemed expedient by the legislature to insert in the statute known as "The Fraudulent Trustees Act" (20 & 21 Vict. c. 54), a clause (*h*) designed to meet and remove the difficulties specified; and this clause has been reproduced with some amendments in the 24 & 25 Vict. c. 96, the 3rd section of which enacts, that "whosoever, being a bailee of any chattel, money, or valuable security (*i*) shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny;" but this provision does not extend to any offence punishable on summary conviction.

There must be not only a taking, but a carrying away to constitute larceny; *cepit et asportavit* was the old law-latin charging the act in an indictment for [* 281] this offence. A bare removal, however, of the goods from the * place in which he found them, though the thief does not quite make off with them, is a sufficient asportation, or carrying away. As if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, has removed them from his chamber down stairs: these have been adjudged sufficient carryings away, to constitute larceny (*j*). Or if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it; this is larceny (*k*).

The taking, and carrying away, must also be felonious; that is, done *animo furandi* in order that it may be larceny (*l*). This requisite, besides excusing those who labour under incapacities of mind or will (of whom we spoke sufficiently at the entrance of this book (*m*)), indemnifies also mere trespassers, and other such petty offenders if arraigned upon a charge of theft. As if a servant takes his master's horse without his knowledge, and brings him home again: if a neighbour takes another's plough that is left in the field, and uses it upon his own land, and then returns it: if, under colour of arrear of rent, where none is due, I distrain another's cattle, or seize them: all these are trespasses, but no felonies (*n*). And should a servant, contrary to the orders of his master, take from his possession any corn or other food for the purpose of giving the same to his master's horses, this would be no felony, but might [* 282] subject the * offender on summary conviction to imprisonment, or the payment of a penalty (*o*).

The ordinary discovery of a felonious intent is where the party does the act,

(*h*) Sect. 4.

(*i*) By s. 1, the term "valuable security" includes any order, or security, entitling or evidencing the title of any person or body corporate to a share or interest in any public stock or fund, whether of the United Kingdom, or of a foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any bank, and also includes any deed, bill, note, warrant, order, or other security for money or for payment of money, and any document of title to lands or goods as defined at pp. 286 (*f*), 304 (*a*).

(*j*) 3 Inst. 108, 109.

(*k*) 1 Hawk. P. C. 93.

(*l*) The felonious ingredients in larceny consists in the intention of the prisoner to defraud; and to apply the thing stolen to his own use; and it is not necessary that the taking should be done *lucri causâ*; taking with an intent to destroy will be sufficient to constitute the offence, if done to serve the prisoner or another person, though not in a pecuniary way. *R. v. Cabbage*, Russ. & Ry. 292.

(*m*) *Ante*, p. 19.

(*n*) 1 Hale, P. C. 509.

(*o*) 26 & 27 Vict. c. 103, s. 1.

charged to be a felony, clandestinely; or, being charged with the fact, denies it. But this is by no means the only criterion of criminality: for in cases that may amount to larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent, or *animus furandi*: wherefore they must be left to the due and attentive consideration of the court and jury.

A trespass in regard to a chattel coupled with a felonious conversion of the chattel whilst such trespass is continuing, may suffice to constitute larceny (*p*). Again, if a chattel is found—not being in the actual possession or custody of any one, and without any ostensible or visible owner—the taking and appropriating of this chattel by the finder may or may not be felonious. It will be so if at the moment of taking the finder of the chattel, reasonably believing that its owner can be discovered, is minded nevertheless to convert such chattel wholly to his own use; it will not be larceny if the finder of the chattel appropriates it having reason to think that it has been really lost (*i. e.*, lost under such circumstances that its owner cannot be found): or if the finder has reason to think that the chattel has been abandoned: or if the finder, having innocently taken it, subsequently forms the felonious intention or design of retaining it and converting it to his own use (*q*). The first question for a jury in any such case may therefore be—did the accused take the property under such circumstances that he would be liable to an * action of trespass *de bonis asportatis* for doing so, assuming that he had no *animus furandi*? [* 283] If trespass would lie, the next question for the jury would be—had the accused any *animus furandi*? If so, he would be guilty of larceny. Obviously it is the duty of counsel for the prisoner on a trial for larceny, where the fact of taking or getting into possession the chattel specified in the indictment is distinctly proved—to contend by any hypothesis which can be based upon the facts in proof, that the taking was not felonious—that it occurred through mistake or carelessness, or in assertion of a right, or with intent to restore the thing taken after it had served some temporary purpose to its lawful owner.

In order to satisfy the definition of larceny at common law, the felonious taking and carrying away above mentioned must be of the personal goods of another: for of things real, or savouring of the realty, larceny at common law cannot be committed. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed by the rules of the common law; but the severance of any such thing was merely a trespass; for by a subtlety in the legal notions of our ancestors, it was regarded as parcel of the real estate; and therefore, whilst it continued so, could not by any possibility be the subject of theft, being absolutely fixed and immoveable. And if things such as mentioned were severed by violence from the freehold, so as to be changed into moveables; and at the same time, by one and the same continued act, were carried off by the person who severed them: they could not, it was thought, be said to have been taken from the proprietor, in this their newly

(p) *Reg. v. Riley*, Dears. 149.

(q) *Reg. v. Thurborn*, 1 Den. 387; *Reg. v. W. 628*; *Reg. v. Dixon*, Dears. 580; *Reg. v. Davies*, *Id.* 640; *Reg. v. Moore* L. & C. 1; *Preston*, 2 *Id.* 353; *Merry v. Green*, 7 M. & *Reg. v. Gardner*, *Id.* 243.

acquired state of mobility (which was deemed essential to the nature of larceny), being never, as such, in the actual or constructive possession of any one, but of him who committed * the trespass. The trespasser could not in strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs chattels at one time from the freehold, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid; and the thief comes at another time, when they are so turned into personalty, and takes them away; this is larceny at common law, and so it is if the owner, or any one else, has severed them (r). (714)

(r) 3 Inst. 109; 1 Hale, P. C. 510.

(714) The common-law distinction between grand and petit larceny has ceased to exist in most of the United States, as well as in England. For definitions of larceny, see *Witt v. The State*, 9 Mo. 671; *Phelps v. People*, 55 Ill. 334; *State v. Ledford*, 67 N. C. 60.

Subjects of larceny. Larceny at common law can be only of goods personal. *State v. Burrows*, 11 Ired. (N. C.) 477, 483. The stealing of real estate is not larceny. *Id.* *People v. Williams*, 85 Cal. 671. This rule is, however, applicable only to things issuing out of or growing upon the lands, and such as "adhere" to the freehold; and not to personal chattels which are constructively annexed thereto. *Jackson v. The State*, 11 Ohio St. 104. Thus, a belt connecting wheels in a mill, and which may be readily removed without injury, is a subject of larceny. *Id.* And when the thing is detached from the soil or freehold, it becomes the subject of larceny. See *Wilkie v. State*, 34 Texas, 155; *People v. Williams*, 85 Cal. 671; *State v. Moore*, 11 Ired. (N. C.) 70; *Ward v. People*, 8 Hill, 395; S. C., 6 id. 144; *State v. Burt*, 64 N. C. 619.

So, to constitute larceny the goods taken must be of some value, however small. *State v. Smart*, 4 Rich. (S. C.) 356; *People v. Wiley*, 3 Hill, 194; *Com. v. Rand*, 7 Metc. (Mass.) 475; *State v. Dobson*, 3 Harr. (Del.) 563; *Wilson v. State*, 1 Port. (Ala.) 118. Thus, at common law no larceny can be committed of animals in which there is no property, either absolute or qualified; as of animals *feræ naturæ* and unreclaimed (*Warren v. State*, 1 Greene [Iowa], 106; *Norton v. Ladd*, 5 N. H. 203); or, even of unreclaimed animals which do not serve for food (*Findley v. Bear*, 8 Serg. & R. [Penn.] 571). But reclaimed honey bees are an exception; their honey being fit for food. *State v. Murphy*, 8 Blackf. (Ind.) 498; *Wallis v. Mease*, 3 Binn. (Penn.) 546. See *Gillet v. Mason*, 7 Johns. 16; *Idol v. Jones*, 2 Dev. (N. C.) 163; *Ferguson v. Miller*, 1 Cow. 243, vol. 1, p. 799, note 401. As to what is a reclaiming of a wild animal, see *Pierson v. Post*, 3 Caines, 175; *Buster v. Newkirk*, 20 Johns. 75; *Gillet v. Mason*, 7 id. 16; *Taber v. Jenny*, 1 Sprague (R. I.), 315; *Com. v. Chase*, 9 Pick. (Mass.) 15; *State v. Turner*, 66 N. C. 618; *Com. v. Beaman*, 8 Gray (Mass.), 497. Oysters planted by an individual in a bed, clearly designated and marked out in a bay or arm of the sea, are the property of him who plants them, and are, therefore, subjects of larceny. *State v. Taylor*, 3 Dutch. (N. J.) 117; *Fleet v. Hegeman*, 14 Wend. 42. Vol. 1, p. 800, note 401.

A chose in action, being considered a mere evidence of value, without intrinsic worth, is not a subject of larceny at common law. *Culp v. State*, 1 Port. (Ala.) 83; *People v. Griffin*, 38 How. 475; *Moore v. Com.*, 8 Barr (Penn.), 260; *U. S. v. Bowen*, 2 Cranch's C. C. 133; *U. S. v. Carnot*, id. 469; *State v. Tillery*, 1 Nott & McCord (S. C.), 9; *Thomasson v. State*, 22 Ga. 499; *Ryland v. State*, 4 Sneed (Tenn.), 357. And the stealing of a letter was held not indictable, as it is of no intrinsic value. *Payne v. People*, 6 Johns. 103. But in the United States, as in England, the larceny of choses in action is made indictable by various statutes, in the construction of which the rules of common law larceny are to be applied. See generally, *State v. Wisdom*, 8 Port. (Ala.) 511; *People v. Call*, 1 Denio, 120; *Vaughn v. Com.*, 10 Gratt. (Va.) 758; *State v. Braden*, 2 Tenn. 68; *Low v. People*, 2 Park. 37; *State v. Hand*, 3 Harr. (Del.) 563; *Com. v. Rand*, 7 Metc. (Mass.) 475; *Donald v. The State*, 8 Mo. 283; *Starkey v. The State*, 6 Ohio St. 266. So, there are statutory provisions against the larceny of things attached to the soil. See *State v. Williams*, 2 Strobb. (S. C.) 474; *State v. Stephenson*, 2 Bailey (S. C.), 334.

In virtue, however, of statutory provisions, larceny may now be committed of many things attached to or growing upon land: each of the following offences being now a felony, and punishable as simple larceny (s):—

(s) *Post*, p. 204 (d).

Ownership of goods. To sustain an indictment for larceny, the alleged stolen goods must be proved to be the absolute or special property of the alleged owner (*State v. Furlong*, 19 Me. 225; *Com. v. Morse*, 14 Mass. 217; *Jones v. Com.*, 17 Gratt. [Va.] 563; *Com. v. Manley*, 12 Pick. [Mass.] 173; *Langford v. State*, 8 Texas, 115), who must be a person other than the defendant. *People v. McKinley*, 9 Cal. 250. Goods stolen from a thief may be charged as the goods of either the thief or the true owner. *Ward v. People*, 8 Hill, 395; S. G., 6 id. 144. See *State v. Somerville*, 21 Me. 14.

There can be no larceny of a man's own goods; but one having the property in goods may commit larceny in stealing them from a bailee to whom he had given them in custody. See *Palmer v. People*, 10 Wend. 165; *State v. De Witt*, 32 Mo. 571; *People v. Thompson*, 34 Cal. 671. So, one having special possession in the goods, as a bailee, may be guilty of larceny by converting them. See *Watson v. State*, 36 Mass. 593; *State v. Watson*, 41 N. H. 533; *State v. Williams*, 35 Mo. 229; *Cary v. Holting*, 1 Hill, 311; *Hite v. State*, 9 Yerg. (Tenn.) 198. See *People v. Thompson*, 34 Cal. 671; *Kirksey v. Fike*, 29 Ala. 206.

The intent. The taking of the goods must be with a "felonious intent;" otherwise there is no larceny. *State v. Gresser*, 19 Mo. 247; *Smith v. Shultz*, 1 Scam. (Ill.) 490; *State v. Hawkins*, 8 Port. (Ala.) 461; *Blunt v. Com.*, 4 Leigh (Va.), 689; *Phelps v. People*, 55 Ill. 334; *State v. Ledford*, 67 N. C. 60. Thus, if one takes goods under the honest impression that they are his own (*State v. Deal*, 64 N. C. 270; *State v. Holmes*, 17 Mo. 379); or borrows without the knowledge of the owner, with an intention to return (*State v. Self*, 1 Bay [S. C.], 242; *State v. York*, 5 Harr. [Del.] 493), it is not larceny. See *State v. Coombs*, 55 Me. 477; *State v. Scott*, 64 N. C. 586; *McDaniels v. State*, 38 Texas, 419. But the taking of a thing with the intent to destroy it is held to be larceny (*Dignowitty v. State*, 17 Texas, 521); and generally the intent to defraud the owner, though without benefit to the thief, is held a sufficient criminal intent in larceny. *Keely v. State*, 14 Ind. 36; *Hamilton v. State*, 35 Mo. 214. This doctrine is not, however, generally accepted in the United States; and, according to the weight of authority, there is no larceny unless the taking was with the expectation of advantage to the taker. In other words, the qualification "*lucri causa*" is in some shape a necessary constituent of larceny. *U. S. v. Durkee*, 1 McAllist. 196; *Resp. v. Teischer*, 1 Dallas (Penn.) 338; *State v. Brown*, 3 Strobb. (S. C.) 503; *State v. Hawkins*, 8 Port. (Ala.) 461; *McDaniel v. State*, 8 Smed. & M. (Miss.) 401.

Returning property does not purge the offense of larceny, although the property was kept feloniously but a moment. *Eckels v. State*, 20 Ohio St. 503; *State v. Scott*, 64 N. C. 586.

Where goods are found on the highway, and the finder, instead of restoring them to the owner, whom he knows, converts them to his own use, such conversion is a felonious taking. *State v. Pratt*, 20 Iowa, 267; *People v. Cogdell*, 1 Hill, 94; *State v. Ferguson*, 2 McMullen (S. C.), 502. But if the owner is unknown at the time of the finding, or there is no reasonable way of ascertaining who the owner was, the rule is otherwise (*People v. Anderson*, 14 Johns. 294; *State v. Taylor*, 25 Iowa, 273; *State v. McCann*, 19 Mo. 251; *Ransom v. State*, 23 Conn. 153. See *Ryland v. State*, 4 Sneed [Tenn.], 357; *State v. Ropper*, 3 Dev. [N. C.] 478; *Lawrence v. State*, 1 Humph. [Tenn.] 228; *People v. McGarren*, 17 Wend. 460); but not as it regards cattle at large in the highway. *People v. Kaatz*, 8 Park. 129; *State v. Martin*, 28 Mo. 530. And, to take a horse found straying on the taker's land, with the intention to conceal it until its owner shall offer a reward for its return, and then to return it and claim the reward, is larceny. *Com. v. Mason*, 105 Mass. 163.

The offense of larceny cannot be committed of abandoned goods. *McGoon v. Ankeny*, 11 Ill. 553.

Where property is hired with a felonious intent, the hiring being a mere pretense to obtain possession, the act is held larceny. *Com. v. Smith*, 1 Penn. Law J. Rep. 400.

The taking and carrying away. To constitute the offense of larceny there must be a taking or severance of the goods from the possession of the owner. But any removal, however slight, of the entire article, is sufficient. *Harrison v. People*, 50 N. Y. (5 Sick.) 518; S. C.,

1. The stealing, cutting, severing, or breaking with intent to steal, glass or wood-work belonging to any building, or lead, metal, or any fixture, fixed in or to any building, or anything made of metal fixed in land being private

10 Am. R. 517; *State v. Wilson*, Coxe (N. J.), 439. So held where the prisoner put his hand into the coat pocket of the complainant, seized the pocket book of the latter, containing money and securities, and lifted it about three inches from the bottom of the pocket, when possession was regained by the owner. *Harrison v. People*, 50 N. Y. (5 Sick.) 518; S. C., 10 Am. R. 517. And see *Com. v. Luckie*, 99 Mass. 431. But merely killing an animal is not sufficient asportation to constitute a larceny of the animal (*State v. Seagler*, 1 Rich. [S. C.] 30. See *State v. Carr*, 13 Vt. 571); and enticing an animal toward the thief by means of food, is not larceny until the animal is in the thief's control. *State v. Wisdom*, 8 Port. (Ala.) 511. See *State v. Martin*, 12 Ired. (N. C.) 157; *Hite v. State*, 9 Yerg. (Tenn.) 198; *Mooney v. State*, 8 Ala. 828.

Illuminating gas may be the subject of larceny (*Com. v. Shaw*, 4 Allen [Mass.], 308); and where it was subtracted from the main pipe by the fraudulent insertion of another pipe, the asportation was held sufficient. *Id.*

There must be a trespass in taking goods, or there can be no larceny. *Morehead v. State*, 9 Humph. (Tenn.) 635; *People v. McDonald*, 43 N. Y. (4 Hand) 61; *Pennsylvania v. Campbell*, Addison (Penn.), 232; *Hite v. State*, 9 Yerg. (Tenn.) 198. And the trespass must be simultaneous with the intent to steal. *Keeley v. State*, 14 Ind. 86; *Fulton v. State*, 8 Eng. (Ark.) 168; *People v. Reynolds*, 2 Mich. 422. In case of a domestic animal, as a horse, the trespass is sufficient if the animal is ridden, driven, or led away (*State v. Gasell*, 30 Mo. 92; *Baldwin v. People*, 1 Scam. [Ill.] 304); or is tolled away by food, etc. *State v. Wisdom*, 8 Port. (Ala.) 511; *State v. Whyte*, 2 Nott & McCord (S. C.), 174, 177.

Where the owner consents to the taking there can be no trespass (*Dodge v. Brittain*, 1 Meigs [Tenn.], 84; *Witt v. State*, 9 Mo. 663; *State v. Jernagan*, 2 Taylor [N. C.], 44; *Dodd v. Hamilton*, *id.* 81); even though consent was obtained by fraud. *Ross v. People*, 5 Hill, 294; *Lewer v. Com.*, 15 Serg. & R. (Penn.) 93. But to avail the defendant the consent must be to the taking of the property in the goods, and not merely to a transfer of the possession. *State v. Humphrey*, 32 Vt. 569; *State v. Watson*, 41 N. H. 533; *Welsh v. People*, 17 Ill. 339; *State v. Lindenthall*, 5 Rich. (S. C.) 237; *Starkie v. Com.*, 7 Leigh (Va.), 752; *Hildebrand v. People*, 56 N. Y. (11 Sick.) 394. See *contra*, *Felter v. State*, 9 Yerg. (Tenn.) 397. Consent, through an agent authorized to give it, is the same as consent coming directly from the principal. *Hite v. State*, 9 Yerg. (Tenn.) 198; *Dodge v. Brittain*, 1 Meigs (Tenn.), 84.

The possession of goods may be in one person, and the custody thereof in another; and the latter may, therefore, commit larceny of them. Thus a servant having the custody of his master's goods, commits larceny in fraudulently converting them to his own use. *People v. Wood*, 2 Park. 22; *Walker v. Com.*, 8 Leigh (Va.), 743; *Com. v. Brown*, 4 Mass. 530. And where the holder of a promissory note, having received a partial payment from the defendant, who was the maker, handed it to him to indorse the payment, who took it away and refused to give it up, it was held that the possession remained in the owner, the defendant acquiring only a temporary charge or custody for the special purpose, and that the subsequent conversion was larceny. *People v. Call*, 1 Denio, 120. And see *Hildebrand v. People*, 56 N. Y. (11 Sick.) 394.

For a very full discussion of the distinction between custody and possession, in connection with the subject of larceny, see 2 Bish. Cr. Law, §§ 824-840.

When a larceny has been committed, and the thief removes the stolen property, he becomes guilty of a complete larceny in every county into which he carries the goods, while his intent to steal continues. *People v. Mellon*, 40 Cal. 648; *State v. Mills*, 17 Me. 211; *Com. v. Somerville*, 21 *id.* 14; *People v. Burk*, 11 Wend. 129; *Com. v. De Witt*, 10 Mass. 154. And this is so of larceny by statute, as well as by the common law. *Com. v. Rand*, 7 Metc. (Mass.) 475; *Com. v. Simpson*, 9 *id.* 138. See *State v. Brown*, 8 Nev. 208; *Alsey v. State*, 39 Ala. 665; *State v. Morales*, 21 Texas, 298.

If goods are stolen in one country, and taken by the thief into another country, the latter country by the English common law has no jurisdiction over the offense. *Com. v. Upchurchard*, 3 Gray (Mass.), 434; *Stanley v. State*, 24 Ohio St. 166. But see *State v. Bartlett*, 11 Vt. 650; *State v. Underwood*, 49 Me. 181; *State v. Williams*, 35 Mo. 229. But in the United

property, or in any place dedicated to public use or ornament, or in any burial ground (*t*).

2. The stealing, or damaging with intent to steal, any tree, shrub, or under-wood—(1) growing in any park, or in any ground adjoining a dwelling-house, in case the value of the article stolen, or the amount of injury done, exceed the sum of 1*l.* (*u*); or, (2) growing elsewhere than in any of the situations just mentioned, in case the value of the article stolen, or the amount of injury done, exceed the sum of 5*l.* (*x*); or, (3) wheresoever growing, if the value of the article stolen, or the amount of injury done amount to one shilling, after summary convictions for the same offence (*y*).

* 3. The stealing or damaging with intent to steal any fruit or vegetable production in a garden, pleasure-ground or conservatory [* 285] after a summary conviction for such offence (*z*).

The following offences, referable to the class under our notice, are likewise felonies, and respectively punishable as below mentioned:—

1. The stealing by a tenant or lodger of any chattel or fixture let to be used by him with any house or lodging (*a*).

2. The stealing, or severing with intent to steal, any ore or coal in any mine (*b*).

Upon a principle nearly the same as that already stated (*c*), the stealing of writings relating to real estate is at common law no felony, but a trespass merely (*d*); because such writings concern the land, or (according to our

(*t*) 24 & 25 Vict. c. 96, s. 81.

(*u*) Sect. 82.

(*x*) *Id.*

(*y*) Sect. 83. The stealing any live or dead fence is punishable on summary conviction, under s. 84.

(*z*) Sect. 86. The stealing or damaging with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicinal purposes, and growing in any land, open or enclosed, not being a garden, or nursery ground, is punishable on summary conviction under s. 87.

(*a*) Sect. 74. Punishment: imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping; and in case the value of the chattel or fixture

stolen exceed the sum of 5*l.*, penal servitude for not more than seven nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*b*) Sect. 88. Punishment: imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

To the same punishment is liable (*s. 89*) any one who being employed in any mine, shall take, or conceal any ore or mineral being in such mine, with intent to defraud the proprietor thereof or any miner employed therein.

(*c*) *Ante*, p. 283.

(*d*) 1 Hale, P. C. 510; Stra. 1187.

States it is held that each State may give such jurisdiction by statute (*People v. Burke*, 11 Wend. 129; *State v. Levy*, 3 Stew. [Ala.] 123; *Hemmaker v. State*, 12 Mo. 453); and as between the several States of the Union, it has been ruled in a portion of the States that this jurisdiction exists at common law (see *Com. v. Andrews*, 2 Mass. 14; *State v. Bartlett*, 11 Vt. 650; *State v. Underwood*, 49 Me. 181; *State v. Brown*, 1 Hayw. [N. C.] 100; *State v. Johnson*, 2 Oregon, 115; *State v. Bennett*, 14 Iowa, 479; *State v. Williams*, 35 Mo. 229; *Watson v. State*, 36 Miss. 598; *State v. Ellis*, 3 Conn. 186; *Cummings v. State*, 1 Harr. & J. [Md.] 340; *Ferrill v. Com.*, 1 Duvall [Ky.], 153; *Hamilton v. State*, 11 Ohio, 435); while in other States it is held to exist only by virtue of a statute. *State v. Renolds*, 14 La. Ann. 278; *People v. Gardner*, 2 Johns. 477; *People v. Schenck*, *id.* 479; *State v. Le Blanche*, 2 Vroom (N. J.), 82; *Simmons v. Com.*, 5 Binn. (Penn.) 619. As to the constitutionality of such a statute, see *People v. Williams*, 24 Mich. 156; *State v. Brown*, 1 Hayw. (N. C.) 100; *Cummings v. State*, 1 Harr. & J. (Md.) 340; *Watson v. State*, 36 Miss. 598; *Hamilton v. State*, 11 Ohio, 435.

The larceny of United States bank notes may be punished under the statutes of a State. *Sallie v. State*, 39 Ala. 691; *State v. Banks*, Phillips (N. C.), 577.

technical language) savour of the realty, and are considered as part of it by the law; so that they descend to the heir together with the land which they concern (e).

[* 286] Upon the above doctrine of our customary law, * innovation has however been made by the Larceny Act, which enacts (1), that whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, obliterate, or conceal the whole or any part of any document of title to lands (f), shall be guilty of felony (g), and (2) that the stealing during the life of a testator, or after his death, or for any fraudulent purpose destroying, cancelling, obliterating, or concealing the whole or any part of a will, codicil, or other testamentary instrument, whether the same relate to real or personal estate, or to both, shall also be a felony (h).

Bonds, bills, and notes, which concern mere choses in action, were also at the common law held not to be goods whereof larceny might be committed: being of no intrinsic value (i); and not importing any property in possession of the person from whom they are taken. But by statute they are now put upon the same footing, with respect to larceny, as the money which they were meant to secure, for the stealing, or for any fraudulent purpose destroying, cancelling, or obliterating any valuable security (k), other than a document of title to lands (l), has been constituted a felony, of the same nature, and punishable in the same manner as if a chattel of value equal to that indicated by the security had been stolen (m).

The law relating to offences against the post-office was consolidated by statute 7 Will. 4 & 1 Vict. c. 36, of * which the 26th section declares any [* 287] person employed under the post-office who shall steal, embezzle (n), secrete, or destroy a post-letter, to be guilty of felony (o). Sect. 27 makes the stealing of any chattel, money, or valuable security out of a post-letter by any person a felony (p). Sect. 28 imposes punishment for the stealing of a post-letter bag, or a post-letter from a post-letter bag, or from a post-office, or from

(e) *Ante*, vol. II.

(f) The term "document of title to lands" includes any deed, map, paper, or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real estate, or to any interest in or out of any real estate. 24 & 25 Vict. c. 96, s. 1.

(g) 24 & 25 Vict. c. 96, s. 28. Punishment: penal servitude for five years.—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

(h) Sect. 29. Punishment: penal servitude for life or for not less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

(i) See *Calye's Case*, 8 Rep. 83.

(k) *Ante*, p. 280 (h).

(l) *Supra*, n. (f).

(m) 24 & 25 Vict. c. 96, s. 27.

(n) As to the meaning of the word "Embezzle," *post*, p. 801.

(o) Punishment: penal servitude for not more than seven nor less than five years,—or imprisonment for not more than three years, with or without hard labour, and with or without solitary confinement.

Any letter posted in the ordinary way, whatever be its address or object, is a post-letter within the above section. *Reg. v. Young*, 1 Den. 194. The secreting, by a letter-carrier, of a letter written by an officer of the post-office to try his honesty, but not posted, is not larceny of a post-letter within the act: but it was held in the same case, that the defendant might be convicted of stealing a sovereign inclosed by the officer in the letter, being one of those which are occasionally found on the floor of the post-office, having dropped out of letters, and which are carried to a fund which is under the direction of the postmaster-general; *Reg. v. Rathbone*, C. & Mar. 220. Stealing from a post-office box a letter, in which a penny was enclosed, not for the purpose of being sent with the letter by the post, but in order to pay the postage, is the stealing of a post-letter containing money, within the 26th section. *Reg. v. Menes*, *Id.* 284; see *Reg. v. Poynton*, L. & C. 247.

(p) Punishment: penal servitude for life or for not less than five years,—or imprisonment for not more than four years, with or without hard labour, and with or without solitary confinement.

any officer of the post-office, or from a mail; or for the stopping of a mail with intent to rob or search it (*q*). Sect. 29 enacts, that every person who shall steal or unlawfully take away a post-letter bag sent by a post-office packet, or who shall steal or unlawfully take a letter out of any such bag, or unlawfully open any such bag, shall be guilty of felony (*r*).

By the above statute punishments are also prescribed for the stealing, destroying, wilfully detaining, delaying, or unlawfully opening of post-letters, printed votes and *proceedings in parliament, newspapers or other printed papers sent by the post, or refusing to deliver up letters [*288] intended for another person, which offences are constituted misdemeanors. And sect. 36 enacts, that every person who shall solicit or endeavour to procure the commission of a felony or misdemeanor punishable by the post-office acts shall be guilty of a misdemeanor, and liable on conviction to imprisonment for any term not exceeding two years.

Larceny also could not at common law be committed of animals in which no right of property either absolute or qualified, was recognised; as of beasts that are *feræ naturæ*, and unreclaimed, such as deer, hares, and conies, in a forest, chase, or warren: fish, in an open river or pond; or wild fowls at their natural liberty (*s*). But if they are reclaimed or confined, and may serve for food, it is otherwise even at common law: for of deer so enclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, larceny might have been committed (*t*). And now ample protection is extended to the owners of animals whether domesticated or not, as well by the Larceny Act as by the game laws. We may conveniently notice, in the order indicated, what has been thus done by the legislature.

1. The stealing of horses, cattle, or sheep, is a felony (*u*). And, 2, whosoever shall wilfully kill any animal with intent to steal the carcase, skin, or any part of it, shall likewise be guilty of felony, and liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony.

*3. Dog stealing, after a summary conviction for that offence, is constituted a misdemeanor (*v*), and, 4, whosoever shall unlawfully [*289] have in his possession or on his premises any stolen dog, or the skin of any stolen dog, knowing such dog to have been stolen or such skin to be the skin of a stolen dog, is on summary conviction liable to a penalty not exceeding 20*l*. And after a previous conviction for such offence may be indicted for a misdemeanor (*w*).

5. If any one corruptly take any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any dog which has been stolen, or is in the possession of any person not being the owner thereof, he is guilty of a misdemeanor (*x*); and, 6, the stealing of any bird (*y*), beast, or other animal ordinarily kept in a state of confinement or for any domestic purpose, not being the subject of larceny at common law, or the wil-

(*q*) Punishment: *ut supra*.

(*r*) Punishment: *ut supra*.

(*s*) 1 Hale, P. C. 511; Foxt. 366.

(*t*) 1 Hawk. P. C. 94; 1 Hale, P. C. 511.

(*u*) 24 & 25 Vict. c. 96, s. 10. Punishment: penal servitude for not more than fourteen years nor less than five years,—or imprisonment for not more than two years, with or

without hard labour, and with or without solitary confinement.

(*v*) Sect. 18. Punishment: imprisonment for not more than eighteen months, with or without hard labour.

(*w*) S. 19. Punishment: *ut supra*.

(*x*) S. 20. Punishment: *ut supra*.

(*y*) As to unlawfully killing pigeons, see s. 23.

fully killing any such bird, beast, or animal, with intent to steal the same, may, on conviction before a justice of the peace, be summarily dealt with; a second offence of this kind being punishable by imprisonment for not more than twelve months (z).

The property in fish also has been esteemed worthy of protection by our legislature, for, 1, the unlawfully and wilfully taking or destroying fish in water which shall run through or be in any land adjoining or belonging to the dwelling house of the owner of such water, or of any person having a right of fishery therein, is a misdemeanor (a): 2, the stealing oysters or oyster brood [* 290] from any oyster bed or fishery, being the property of any other * person, and sufficiently marked out or known as such, is constituted a felony, punishable as simple larceny (b); and, 3, whosoever shall unlawfully and wilfully use any dredge or net within the limits of any such oyster bed or fishery, for the purpose of taking oysters or oyster brood, although none be actually taken (c): or, 4, shall unlawfully and wilfully, with any net, drag upon the ground or soil of any such fishery (d), shall be guilty of a misdemeanor, and being convicted thereof shall, for either offence, be liable to imprisonment for any term not exceeding three months, with or without hard labour, and with or without solitary confinement.

The origin of the game laws having been considered in a former volume (e), where some account also was given of their past and present operation, we shall here speak only of offences constituted by them, or having relation to the property of individuals in such beasts and fowls as are ranked under the denomination of game.

First, then, it is enacted, that any person unlawfully hunting, killing, or wounding deer, being in the uninclosed part of any forest, chase, or purlieu, shall be liable, on summary conviction before a justice of the peace, to a penalty not exceeding 50*l.*; or if this offence be committed by one who has been previously convicted of any offence relating to deer, for which a pecuniary penalty is imposed by act of parliament, he may be convicted of felony, and be punishable as under-mentioned (f). And the unlawfully hunting, killing, or wounding deer, in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer are usually kept, is constituted a felony (g); some minor offences of a like kind, below briefly indicated, being summarily punishable (h).

* A trespass during the daytime in pursuit of game subjects the [* 291] offender to civil proceedings for the trespass; or, under the provis-

(z) Sect. 21, and see s. 22.

(a) Sect. 24. This provision, however, does not extend to any person angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset.

(b) Sect. 26.

(c) *Id.*

(d) *Id.*

(e) Vol. ii.

(f) Sect. 12. Punishment: imprisonment for not more than two years—with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(g) Sect. 13. Punishment: *ut supra*.

(h) By s. 14, suspected persons found in possession of venison, and not satisfactorily accounting for it, may on summary conviction be fined to an amount not exceeding 20*l.* By s. 15, persons setting engines for taking deer or pulling down park fences, are in like manner punishable. And by s. 16, the deer keeper may seize the gun of an offender, who, on demand, does not deliver up the same, and, if such offender unlawfully beat or wound any person intrusted with the care of the deer, or his assistants, in the execution of the powers given by the above act, he will be guilty of felony, and liable to the punishment specified, *supra*, n. (f).

ions of the statutes below cited (i), after summary conviction, to a pecuniary penalty (j).

And in consequence of the dangerous conflicts which are apt to arise from the pursuit of game by night, the stat. 9 Geo. 4, c. 69, was passed; by the 1st section of which it is enacted, that if any person by night (k), unlawfully take or destroy game (l) or rabbits in any land, open or inclosed (m), or by night unlawfully enter upon land, * with a gun, net, or other instrument, [* 292] for the purpose of taking or destroying game, he shall be summarily punishable by two justices of the peace; and after two convictions for this offence, may be indicted for a misdemeanor, and, being convicted thereof, will be liable to the punishment under-mentioned (n). And if persons, to the number of three or more together, by night unlawfully enter on land, open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with a gun, bludgeon, or other offensive weapon, each and every of such persons will be guilty of a misdemeanor, and punishable as under-mentioned (o).

Further, by the Larceny Act, it is enacted, that "whosoever shall unlawfully and wilfully, between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise, take or kill any hare or rabbit in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not, shall be guilty of a misdemeanor" (p).

From what has been set forth in the preceding pages, we collect, that of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domitæ naturæ*, which serve for food, as cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool, larceny may at common law be committed; and also of the flesh of such as are either *domitæ* or *feræ naturæ*, when killed (q). As * to those animals, which do not serve for food, and which therefore the [* 293]

(i) See 1 & 2 Will. 4, c. 32, ss. 30, 32, 33.

By s. 34 daytime for the purposes of the act "shall be deemed to commence at the beginning of last hour before sunrise, and to conclude at the expiration of the first hour after sunset."

Also by 24 & 25 Vict. c. 96, s. 17, "whosoever shall unlawfully and wilfully, between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, take or kill any hare or rabbit" in a warren, inclosed or not, or "shall at any time set or use therein any snare or engine for the taking of hares or rabbits, shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 5*l.*, as to the justice shall seem meet." See further stat. 25 & 26 Vict. c. 114.

(j) By s. 46 of 1 & 2 Will. 4, c. 32, if criminal proceedings have been instituted in respect of any trespass after game, no action will be maintainable for the same trespass.

(k) For the purpose of the above act, the night is considered to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise. S. 12.

(l) The word "game" here used includes

hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards. S. 18.

(m) The operation of the above section has by stat. 7 & 8 Vict. c. 29, s. 1, been extended to the unlawfully taking or destroying any game or rabbits by night, on any public road or highway.

(n) Penal servitude for not more than seven nor less than five years,—or imprisonment with hard labour for not more than two years. A like punishment is by s. 2 imposed for any assault committed by an offender under s. 1 upon any person authorized to apprehend him.

(o) 9 Geo. 4, c. 69, s. 9. Punishment: penal servitude for not more than fourteen nor less than five years,—or imprisonment with hard labour for not more than three years.

(p) 24 & 25 Vict. c. 96, s. 17.

(q) 1 Hale, P. C. 511.

It is also said that, if swans be lawfully marked, it is felony to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond, otherwise it is only a trespass. Dalt. Just. c. 156.

As to illegally destroying the eggs of swans, see 1 & 2 Will. 4, c. 32, s. 24.

law holds to have no intrinsic value, as dogs and other creatures kept, for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them (*r*), yet they are not of such estimation as that the crime of stealing them amounts at common law to larceny (*s*). The operation of our common law having been found inefficacious to protect the property in animals from theft, has been greatly extended, and in some respects been rendered definite by the legislature. For the preservation of game especially, the wrongful pursuit of which involves a trespass to realty and induces to crimes of violence, various enactments, far more lenient than the ancient forest laws, have replaced them in the statute book.

Notwithstanding that larceny cannot be committed unless there be some property in the thing taken, and an owner of it; yet if the owner of the chattel be unknown, provided there be a property in it, larceny may be committed by stealing it; and an indictment will lie for stealing the goods of a person unknown (*t*). In like manner as among the Romans, the *lex Hostilia de furtis* provided that a prosecution for theft might be carried on without the intervention of the owner (*u*). This is the case of stealing a shroud out of a grave; which is the property of those, whoever they were, who buried the deceased: but stealing the corpse itself, which has no owner, (though an act of great indecency,) is no felony, unless some of the grave-cloths be stolen with it (*x*).

[* 294] * Having thus considered the general nature of simple larceny, I come next to treat of its punishment. Theft, by the Jewish law, was only punished with a pecuniary fine, and satisfaction to the party injured (*z*). And in the civil law, till some very late constitutions, we never find the punishment capital. The laws of Draco at Athens punished it with death: but his laws were said to be written in blood; and Solon afterwards changed the penalty to a pecuniary mulct. And so the Attic laws in general continued (*a*); except that once, in a time of dearth, it was made capital to break into a garden, and steal figs: but this law and the informers against the offence, grew so odious, that from them all malicious informers were styled sycophants; a name which we have much perverted from its original meaning.

Our ancient Saxon laws nominally punished theft with death, if above the value of twelvepence: but the criminal was permitted to redeem his life by a pecuniary ransom; as, among their ancestors the Germans, by a stated number of cattle (*b*). In the ninth year of Henry I., however, this power of redemption was taken away, and all persons guilty of larceny above the value of twelvepence were directed to be hanged (*c*); which law continued in force until the passing of of the statute 7 & 8 Geo. 4, c. 29, by which capital punishment for larceny was abolished, and the punishment of this offence is now such as under-mentioned (*d*).

(*r*) *Ante*, vol. ii.

(*s*) 1 Hale, P. C. 512.

Ferrets, though tame and saleable, are not the subject of larceny. *R. v. Searing*, Russ. & Ry. 350; but bees are property, and are the subject of larceny. Judgment *Hannam v. Mockett*, 2 B. & C. 944.

(*t*) 1 Hale, P. C. 512.

(*u*) Gravin. l. 3, § 106.

(*x*) *Ante*, vol. ii.

(*z*) Exod. c. xxii.

(*a*) Petit. Leg. Attic. l. 7, tit. 5.

(*b*) Tac. de Mor. Germ. c. 12.

(*c*) But benefit of clergy was in many cases allowed on a first conviction for simple larceny.

(*d*) Penal servitude for five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping; 24 & 25 Vict. c. 96, s. 4, or after a previous conviction for an indictable misdemeanor, punishable under the above act, penal servitude for not more than seven nor less than five years,—or imprisonment for

* On a charge, however, of committing or attempting to commit simple larceny (or of attempting to commit larceny from the person (e)), where the value of the property alleged to have been stolen does not in the opinion of the justices exceed 5s., they are empowered to hear and determine the charge summarily; and if the accused confess or the charge be proved, they may convict and sentence him to the punishment below mentioned (f). But if the person charged do not consent to have the case summarily heard and determined, or if it appear to such justices that the offence is one which, owing to a previous conviction of the person charged, is punishable with penal servitude; or if they be of opinion that the charge is, from any other circumstances, fit to be made the subject of prosecution by indictment, rather than to be disposed of summarily, such justices are required, instead of summarily adjudicating thereon, to deal with the case as if the act now referred to had not been passed. Further, if upon the hearing of the charge such justices be of opinion that there are circumstances in the case which render it *inexpedient to inflict any punishment, they are empowered [* 296] to dismiss the person charged, without proceeding to a conviction (g).

Again—where any person is charged before justices at petty sessions with simple larceny (the property alleged to have been stolen exceeding in value 5s.), or with stealing from the person, or with larceny as a clerk or servant (h), and the evidence is in the opinion of such justices sufficient to justify committal for trial, such justices, if the case appear to them to be one which may properly be disposed of in a summary way, shall read the charge to the accused, ask him whether he is guilty or not guilty thereof, and on a confession of guilt shall cause a plea of guilty to be entered upon the proceedings, and sentence the accused to imprisonment, with or without hard labour, for not more than six months (i).

In regard to simple larceny, or any offence punishable as simple larceny, when committed by an offender under the age of sixteen, summary jurisdiction is now exerciseable by justices of the peace in virtue of the statutes above cited (j).

VI. Larceny is aggravated when committed by a clerk or servant, or by one employed for the purpose or in the capacity of a clerk or servant; such larceny

not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping; *Id.* s. 8; or after a previous conviction for felony (whether upon an indictment or under the provisions of the statute 18 & 19 Vict. c. 126)—penal servitude for not more than ten nor less than five years, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping, s. 7.

Also by s. 9 of the same statute (24 & 25 Vict. c. 96), whosoever shall commit the offence of simple larceny, or any offence thereby made punishable like simple larceny, after having been twice summarily convicted of any of the offences punishable upon summary conviction, under the provisions contained in the following statutes: 10 & 11

Vict. c. 82; 11 & 12 Vict. c. 59; 14 & 15 Vict. c. 92; 24 & 25 Vict. c. 97; shall be guilty of felony, and liable to penal servitude for not more than seven nor less than five years,—or to imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(e) As to which, *post*, p. 298.

(f) Imprisonment with or without hard labour for not more than three months. 18 & 19 Vict. c. 126, s. 1.

(g) Sect. 1.

(h) As to these offences, *post*, pp. 296, 298.

(i) 18 & 19 Vict. c. 126, s. 8.

A summary conviction under the above act is not attended with any forfeiture. Sect. 11.

(j) 10 & 11 Vict. c. 82, extended by 18 & 14 Vict. c. 37. See also 29 & 30 Vict. c. 117, s. 14.

VI. Aggravated may be of any chattel, money, or valuable security belonging to larceny. or in the possession or power of the master or employer (*k*).

[* 297] * Larceny, also, when committed by a person employed in the public service of her majesty, or in the police, is more severely punishable than in ordinary cases (*l*).

VII. Mixed or compound larceny is such as has all the properties of simple larceny, but is accompanied with a taking from one's house or person. First, therefore, of larceny from the house, and then of larceny from the person.

1. Larceny from the house, though it seems (from considerations before mentioned (*m*)), to have a higher degree of guilt than simple larceny, yet is not at all distinguished from the other at common law (*n*); unless where it is accompanied with the circumstance of breaking the house by night; and then we have seen that it falls under another description, viz. that of burglary (*o*). But by statute each of the following offences is constituted a felony more heinous than simple larceny:—

(1.) The stealing in a dwelling-house (*p*) of any chattel, money, or valuable security (*q*), to the value of 5*l*. or more (*r*).

(2.) The stealing of any chattel, money, or valuable security in a dwelling-house, and by any menace or threat putting some person therein in bodily fear (*s*).

(3.) The stealing to the value of 10*s*. of any woollen, linen, hempen, or cotton yarn, or any goods or article of silk, woollen, linen, cotton, alpaca, or mohair, or of any one or more of those materials mixed with each other, or mixed with any other material. whilst exposed during * any stage or process of manufacture, in any building, or other place (*t*).

(4.) The stealing of goods or merchandize in any vessel, whether in a haven or port of entry or discharge, or upon any navigable river or canal, or from any dock, wharf, or quay adjacent to any such haven, port, river, or canal (*u*).

(5.) The plundering or stealing any part of a vessel in distress, wrecked, or cast on shore, or goods, or merchandize thereto belonging (*x*). With reference to which offence we may remark, that larceny could not at common law be committed of wreck till seized by the king or person having the franchise, for till such seizure no one could be said to have a determinate property therein.

2. Larceny from the person is either by privately stealing or by open and violent assault, which is usually called robbery.

(*k*) 24 & 25 Vict. c. 96, s. 67. Punishment: penal servitude for not more than fourteen nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

As to the taking by a servant of corn for his master's horses, contrary to his orders, *ante*, p. 281.

(*l*) *Ante*, p. 119.

(*m*) *Ante*, pp. 270, *et seq*.

(*n*) 1 Hawk. P. C. 98.

(*o*) *Ante*, p. 270.

(*p*) As to the definition of "dwelling-house," *ante*, p. 274.

(*q*) *Ante*, p. 280 (*q*).

(*r*) 24 & 25 Vict. c. 96, s. 60. Punishment: penal servitude for not more than fourteen nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

(*s*) Sect. 61. Punishment: *ut supra*.

(*t*) Sect. 62. Punishment: *ut supra*.

(*u*) Sect. 63. Punishment: *ut supra*.

(*x*) Sect. 64. Punishment: *ut supra*.

By s. 65, persons in possession of shipwrecked goods not giving a satisfactory account as to how they became possessed of them, may be summarily punished; and by s. 66, shipwrecked goods offered for sale, under suspicious circumstances, may be seized.

The offence of privately stealing from a man's person, to the value of above twelvepence, as by picking his pocket or the like, privily without his knowledge, was capitally punishable and debarred of the benefit of clergy, so early as by the statute 8 Eliz. c. 4. This severity seems to have been owing to the ease with which such offences are committed, the difficulty of guarding against them, and the boldness with which they were practised (even in the queen's court and presence) at the time when this statute was made: besides that this is an infringement of property, in the manual occupation or corporal possession of the owner, which was an offence even in a state of * nature (y). Stealing from the person is now punishable as here- [* 299] inafter stated (z).*

Open and violent larceny from the person, or robbery, the *rapina* of the civilians, is the felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear (a). To constitute this offence:—(1) There must be a taking, otherwise it is no robbery. If, however, the thief, having once taken a purse, returns it, still it is a robbery; and so it is whether the taking be strictly from the person of another, or in his presence only; as, where a robber by menaces and violence puts a man in fear, and drives away his sheep or his cattle before his face (b). But if the taking be not either directly from his person, or in his presence, it is no robbery (c). (2) It is immaterial of what value the thing taken is; a penny as well as a pound, thus forcibly extorted, makes a robbery (d). (3) The taking must be by force, or a previous putting in fear; which makes the violation of the person more atrocious than in privately stealing. For, according to the maxim of the civil law (e), "*qui vi rapuit, fur improbius esse videtur.*" This previous violence, or putting in fear, is the criterion that distinguishes robbery from other larcenies. For if one privately steals sixpence from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent to the taking (f). The ordinary allegation in an indictment for robbery that it was done by putting in fear, does not imply any great degree of terror or affright in the party robbed: it is enough that so much force, or threatening * by word or gesture, be used, as might create an appre- [* 300] hension of danger, or induce a man to part with his property without or against his consent (g). Thus, if a man knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be put in fear, yet this is undoubtedly a robbery. Or, if a person with a sword drawn begs alms, and I give it him through mistrust and

(y) Therefore the *saccularii*, or cutpurses, were more severely punished than common thieves by the Roman and Athenian laws. Dig. 47, 11, 7; Pott. Antiq. l. 1, c. 26.

(z) Post, p. 300.

(a) 1 Hawk. P. C. 95.

(b) 1 Hale, P. C. 533.

(c) Comyn, 478; Stra. 1015.

(d) 1 Hawk. P. C. 97.

(e) Dig. 4, 2, 14, § 12.

(f) 1 Hale, P. C. 534.

(g) Fost. 128.

* Whenever any larceny shall be committed by stealing, taking and carrying away from the person of another, the offender may be punished as for grand larceny, although the value of the property taken shall be less than twenty-five dollars. Attempts under similar circumstances may be punished as for attempts to commit grand larceny." Laws of N. Y. 1862, ch. 374, § 2. See, also, § 3. See, also, 2 R. S. 679, §§ 63, 65. Under these statutes it is grand larceny to steal from the person although less than twenty-five dollars in value be stolen; and this without regard to the circumstances whether the larceny be committed in the day or the night time. *Fallon v. People*, 2 Abb. Ct. App. 88, 85; 6 Park. 256.

apprehension of violence, this is a felonious robbery (*h*). So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it may well be doubted whether the forcing a person to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery (*i*). And upon the authorities we may conclude (*k*) that "the true definition of robbery is the stealing or taking from the person of another, or in the presence of another, property of any amount, with such a degree of force or terror as to induce the party unwillingly to part with his property; and whether terror arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference; for to most men the idea of losing their fame and reputation is equally if not more terrific than the dread of personal injury. The principal ingredient in robbery is a man's being forced to part with his property" (*l*). (715)

Such being robbery and stealing from the person at common law, it has been enacted:—(1) That whosoever shall rob any person, or shall steal any chattel, money, or valuable security from the person of another (*m*); or (2) [* 301] "shall assault any person with intent to rob (*n*); or (3) being armed with any offensive weapon, shall rob, or assault with intent to rob, any person, or shall, together with one or more other person or persons, rob, or assault with intent to rob, any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery shall wound, beat, strike, or use any other personal violence to any person (*o*)—shall be

(*h*) 1 Hawk. P. C. 96.

(*i*) *Ibid.* 97.

(*k*) *R. v. Hickman*, 1 Leach, 278; *R. v. M'Daniel*, Fost. 121, 128.

(*l*) *R. v. Cannon*, Russ. & Ry. 148; *R. v. Fuller*, Id. 408; *R. v. Gascoyne*, Id. 280.

(*m*) 24 & 25 Vict. c. 96, s. 40. Punishment: penal servitude for not more than fourteen years nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement. On conviction for an offence under s. 43, whipping may be added: 26 & 27 Vict. c. 44.

(*n*) Sect. 42. Punishment: (except in cases

where a greater punishment is provided by the act) penal servitude for five years, or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement. By s. 41, on an indictment for robbery the jury may convict of an assault with intent to rob; as if the evidence should fail to show a taking and carrying away. Arch. Cr. Pl. 16th ed., p. 388.

(*o*) Sect. 43. Punishment: penal servitude for life, or not less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

(715) Robbery is a compound larceny; that is, larceny together with sufficient aggravating matter to raise the offense to robbery. The taking must be from the person, or in the presence of the prosecutor. *Turner v. State*, 1 Ohio St. 422; *U. S. v. Jones*, 3 Wash. C. C. 209; *Kitt v. State*, 11 Humph. (Tenn.) 167. And, as in cases of larceny, the goods must appear to have been taken *animus furandi*. *Long v. State*, 12 Ga. 298. In an indictment for robbery an allegation of force and violence is sufficient, without alleging that the party robbed was put in fear. *Com. v. Humphrey*, 7 Mass. 242; *Com. v. Snelling*, 4 Binn. (Penn.) 379; *State v. McCune*, 5 R. I. 60. See *Bonsall v. State*, 35 Ind. 460. But where fear is averred it must be proved. *Glass v. Com.*, 6 Bush (Ky.), 436. It is robbery to extort money by means of a charge of sodomy. *Britt v. State*, 7 Humph. (Tenn.) 45; *People v. McDaniel*, 1 Park. 199; *Long v. State*, 12 Ga. 298. But a threat of prosecution for any other crime will not justify such fear as is necessary in robbery. *Id.*

The mere snatching of an article of property from the person of another is not robbery. *People v. Hall*, 6 Park. 642; *McCloskey v. The People*, 5 id. 299. The property must be taken by violence; and the violence must be sufficient to force the person to part with his property, not only against his will, but in spite of his resistance. *Id.* But see *State v. John*, 5 Jones (N. C.), 163. If, however, fear is proved, it is sufficient. *Com. v. Snelling*, 4 Binn. (Penn.) 379. The mere taking goods from an unconscious person without force is not robbery. *Brennen v. State*, 25 Ind. 403.

guilty of felony and punishable for each of the foregoing offences in the manner below mentioned.

VIII. Distinguishable not without difficulty (*p*) from the crime of larceny is embezzlement—which consists in the *fraudulent conversion of [* 302] property before it has come into the actual possession of its rightful owner—as by a clerk or servant, or one employed for the purpose or in the capacity of a clerk or servant. If such a person fraudulently embezzle any chattel, money, or valuable security delivered to, received or taken into possession by him for or in the name, or on the account of his master or employer, he shall be deemed to have feloniously stolen the same, although such chattel, money, or security had not been received into the possession of his master or employer otherwise than by the actual possession of the defendant (*q*).

To the offence of embezzlement by a clerk or servant, the provisions of the statute 18 & 19 Vict. c. 126, have been rendered applicable (*r*).

IX. Besides the technical offence of embezzlement, frauds committed by confidential agents and bailees have by statute, to a great extent, been defined, and made punishable; offences falling within this class can but be barely enumerated in these pages; their nature and the ingredients in them may thus be indicated:—

Any person is guilty of a misdemeanor and liable to the punishment under-mentioned (*s*):—

(*p*) *Reg. v. Reed*, Dears. 168, 257; *Reg. v. Gill*, Id. 289; *Reg. v. Watts*, 2 Den. 14.

The distinction between larceny by a servant and embezzlement is now of little practical importance, for by stat. 24 & 25 Vict. c. 96, s. 72, if upon the trial of any person indicted for embezzlement, it be proved that he took the property in question in such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury may return as their verdict that such person is not guilty of embezzlement, but is guilty of simple larceny, or of larceny as a clerk, or servant; and thereupon such person will be liable to be punished in the same manner as if he had been convicted upon an indictment for larceny; and if upon the trial of any person indicted for larceny it be proved that he took the property in question in such manner as to amount in law to embezzlement, he shall not by reason thereof be entitled to be acquitted, but the jury may return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, and thereupon such person will be liable to be punished in the same manner as if he had been convicted upon an indictment for embezzlement, and no person so tried for embezzlement, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny, or embezzlement, upon the same facts.

(*q*) 24 & 25 Vict. c. 96, s. 67. Punishment: penal servitude for not more than fourteen nor less than five years,—or imprisonment for not more than two years, with or without

hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Embezzlement by any officer of the Bank of England is yet more severely punishable. *Id.* s. 73.

(*r*) 31 & 32 Vict. c. 116, s. 2. As to embezzlement by a member of a co-partnership. *Id.* s. 1.

(*s*) Penal servitude for not more than seven nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

See the sects. of the stat. 24 & 25 Vict. c. 96, cited *infra*.

The provisions contained in these sections it has been thought desirable to set out, almost verbatim, inasmuch as they are of great practical importance, applying to very many species of fraud which of late have unhappily been not infrequently, inasmuch also as their meaning cannot better be conveyed than in the words which have been adopted by the legislature. The frauds punishable under these clauses are, briefly, such as may be committed by bankers and other agents intrusted with money or securities, and dealing with them dishonestly; by trustees in illegally converting the trust property for their own benefit; by directors and officers of companies in like manner dealing with the property of their share-holders or by wilfully false statements, including persons to become shareholders.

[*303] *1. Who, having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with money or any security for the payment of money, with direction in writing to apply, pay, or deliver such money or security, or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively (t).

2. Who, having been so intrusted as aforesaid with any chattel or valuable security (u), or power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom, or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company, or society, for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security or power of attorney was intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof (x).

[*304] *3. Who, being a banker, merchant, broker, attorney, or agent, and being intrusted, either solely or jointly with any other person, with the property of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted (y).

4. Who, being intrusted, either solely or jointly with any other person, with any power of attorney for the sale or transfer of property, shall fraudulently sell, transfer, or otherwise convert the same or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted (z).

5. Who, being a factor or agent intrusted, either solely or jointly with any other person, for the purpose of sale or otherwise, with the possession of goods, or of any document of title to goods (a), shall, contrary to or without the authority of his principal in that behalf, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or document of title so intrusted to him, as and by way of a pledge, lien, or security for any money or valuable security borrowed or

(t) 24 & 25 Vict. c. 96, s. 75.

(u) *Ante*, p. 280 n. (i).

(x) Sect. 75.

(y) Sect. 76.

(z) Sect. 77.

(a) The above term "document of title to goods" includes "any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing,

bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to": 24 & 25 Vict. c. 96, s. 1.

received by such factor or agent at or before the time of making such consignment, deposit, transfer, or delivery, or intended to be thereafter borrowed or received, or shall, * contrary to or without such authority, for his own use or benefit, or the use or benefit of any other person than the [*305] person by whom he was so intrusted, and in violation of good faith, accept any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer, or deliver any such goods or document of title (b).

6. Who shall knowingly and wilfully act and assist in making any such consignment, deposit, transfer, or delivery, or in accepting or procuring such advance as last aforesaid (c).

* 7. Who, being a trustee (d) of property (e) for the use or benefit, either wholly or partially, of some other person, or for any public or [*306] charitable purpose, shall, with intent to defraud, convert or appropriate the same, or any part thereof, to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of or destroy such property, or any part thereof (f).

8. Who, being a director, member, or public officer of any body corporate

(b) Sect. 78.

(c) *Ibid.*

Some of the material words used in the above paragraphs are thus defined by s. 79:—

(1) Any factor or agent intrusted, and possessed of any such document of title, as aforesaid whether derived immediately from the owner of goods or obtained by reason of such factor or agent having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed to have been "intrusted" with the possession of the goods represented by such document of title.

(2) Every contract pledging or giving a lien upon such document of title as above mentioned, shall be deemed to be a pledge of and lien upon the goods to which it relates.

(3) A factor or agent shall be deemed to be possessed of such goods or document as above mentioned, whether the same be in his actual custody, or be held by some other person subject to his control, or for him or on his behalf.

(4) Where any loan or advance is *bond fide* made to any factor or agent intrusted with and in possession of any such goods or document of title, as above mentioned, on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or document of title, and such goods or document of title is actually received by the person making such loan or advance, without notice that such factor or agent was not authorized to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or document of title within the meaning of the two last paragraphs, though such goods or document of title be not actually received by the person making such loan or advance till a period subsequent thereto.

(5) Any contract or agreement, whether made direct with a factor or agent, or with a clerk or other person on his behalf, shall be deemed to be a contract or agreement with such factor or agent

(6) Any payment made, whether by money, bill of exchange or other negotiable security, shall be deemed to be an advance within the meaning of the two last paragraphs.

(7) A factor or agent in possession of such goods or document as above mentioned shall be taken, for the purposes of the two last paragraphs, to have been intrusted therewith by the owner thereof, unless the contrary be shown in evidence.

(d) The term "Trustee" means a trustee on some express trust created by deed, will, or instrument in writing, and includes the heir, or personal representative of any such trustee, and any other person upon or to whom the duty of such trust shall have devolved or come, and also an executor and administrator, and an official manager, assignee, liquidator, or other like officer acting under any present or future act relating to joint stock companies or bankruptcy. Sect. 1.

(e) The term "Property" includes "every description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods," and also includes "not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and any thing acquired by such conversion or exchange, whether immediately or otherwise." Sect. 1.

(f) Sect. 80.

or public company, shall fraudulently take or apply for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company (g).

9. Who, being a director, public officer, or manager of any body corporate or public company, shall as such receive or possess himself of any of the property of such body *corporate or public company otherwise than in [*307] payment of a just debt or demand, and shall, with intent to defraud, omit to make, or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company (h).

10. Who, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular, in any book of account or other document (i).

11. Who, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof (k). (716)

X. The offence next to be noticed is now constituted by the 88th sect. of the Larceny Act (24 & 25 Vict. c. 96), which enacts that whosoever by any false pretence obtains from any other person any chattel, money, or valuable security, with intent to defraud (l), shall be guilty of a *misdemeanor (m), of which the defendant may be convicted, [*308] although on the trial it be proved that he obtained the property in question in such manner as to amount in law to larceny.

The offence of obtaining money or goods by false pretences is indeed very closely allied to that of larceny (n), but thus mainly distinguishable from it, that in larceny the property in the thing taken does not pass, whereas in false

(g) Sect. 81.

(h) Sect. 82.

(i) Sect. 83. See also stat. 25 & 26 Vict. c. 89, s. 166.

(k) Sect. 84. See also stat. 29 & 30 Vict. c. 108, ss. 15—17. Any officer of a savings' bank receiving a deposit, and not accounting for and paying over the same, is guilty of a misdemeanor under stat. 26 & 27 Vict. c. 87, s. 9.

(l) Proof of a general intent to defraud, without showing an intent to defraud any particular person, is sufficient. Sect. 88.

(m) Punishment: penal servitude for five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

(n) See *Reg. v. Thompson*, L. & C. 253.

(716) Statutes of embezzlement were passed solely and exclusively to provide for cases which larceny at common law did not include, and they form two distinct classes: first, those meeting the case of servants and clerks, appropriating their master's property before it reaches his possession; and secondly, those meeting the case of trustees and bailees appropriating goods of which they obtained possession *bona fide*. Nothing that is larceny at common law is larceny under the embezzlement statutes; and nothing that is larceny under the embezzlement statutes is larceny at common law. 2 Whart. Cr. Law, § 1905.

pretences it is meant to do so. The pretence, however, to come within the operation of the above statute, must be of an existing fact—a mere expression of opinion, *ex. gr.* as to the quality of goods pledged or sold (*o*), or a mere statement of an intention, *ex. gr.*, to pay for goods on delivery (*p*), will not suffice (*q*). Such pretence may, however, be evidenced by the acts and conduct of the defendant without any verbal misrepresentation (*r*).

It may be well to add that proof of the existence of a contract between the prosecutor and defendant relating to the transaction, *sub judice*, will not necessarily secure from punishment the latter party, on a charge of obtaining money or goods by false pretences in conformity with the contract (*s*); though where a contract thus intervenes, a difficulty may be felt in bringing within the statutory definition of the offence under notice, every case of a really criminal complexion, without at the same time, and as it were by the same breath, declaring to be criminal *acts of tortious misrepresentation or overcharge (*t*), for which, according to established precedents, the remedy [* 309] should be exclusively by action.

Within the meaning of the 88th section of the Larceny Act, above cited, is the offence of causing or procuring by any false pretence money to be paid, or any chattel, or valuable security, to be delivered to any other person, whether for the benefit of the person making such false pretence, or of any other person, the intent being to defraud (*u*).

And whosoever, with intent to defraud or injure, by any false pretence fraudulently causes or induces another to execute, make, accept, endorse, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, or the seal of any body corporate, upon any paper or parchment, in order that the same may be afterwards made or converted into or dealt with as a valuable security, is guilty of a misdemeanor (*x*). (717)

(*o*) *Reg. v. Bryan*, Dears. & B. 265; *Reg. v. Roebuck*, *Id.* 24; *Reg. v. Burgon*, *Id.* 11; *Reg. v. Goss*, Bell, 208; *Reg. v. Ragg*, *Id.* 214.

(*p*) *R. v. Goodhall*, Russ. & Ry. 461; *Reg. v. Lee*, L. & C. 309; *Reg. v. Jennison*, *Id.* 157.

(*q*) *Reg. v. Woolley*, 1 Den. 559; *Reg. v. Burnside*, Bell, 282.

(*r*) *Reg. v. Barnard*, 7 C. & P. 784.

(*s*) *Per* Lord Denman, C. J.: *R. v. Abbott*, 1 Den. 173; *Reg. v. Martin*, 36 L. J., M. C. 20; *Reg. v. Gardner*, 1 Dears. & B. 40; *Reg. v. Bryan*, and cases, *supra*, n. (*o*).

(*t*) See *Reg. v. Oates*, Dears. 459.

(*u*) Sect. 89. Punishment: *ut supra*, n. (*m*).

(*x*) Sect. 90. Punishment: *ut supra*, n. (*m*).

(717) The American statutes against the obtaining of goods, or cheating, by false pretences, are in substance modeled from the English; and the English interpretations of these statutes are, in a general way, adopted by our courts. See *Com. v. Wilgus*, 4 Pick. (Mass.) 177; *People v. Clough*, 17 Wend. 351; *State v. Rowley*, 12 Conn. 101; *People v. Johnson*, 12 Johns. 292; *People v. Stone*, 9 Wend. 182; *McCord v. People*, 46 N. Y. (1 Sick.) 470. As against defendants they are to be strictly construed. See *People v. Stetson*, 4 Barb. 151; *People v. Clough*, 17 Wend. 351; *Com. v. Drew*, 19 Pick. (Mass.) 179.

A false pretense has been defined as "a representation of some fact or circumstance calculated to mislead, which is not true." *Com. v. Drew*, 19 Pick. (Mass.) 179, 184. See *People v. Gates*, 13 Wend. 311; *Com. v. Henry*, 10 Harr. (Penn.) 258; *State v. Layman*, 8 Blackf. (Ind.) 330. The pretense must be really false. *People v. Tompkins*, 1 Park. 224. The belief that it is false, by the person using it, is insufficient. See *Com. v. Stone*, 4 Metc. (Mass.) 43. But one false pretense only need be proved to sustain the indictment. *State v. Mills*, 17 Me. 211; *State v. Dunlap*, 24 id. 77; *People v. Haynes*, 14 Wend. 546. The pretense must relate either to the past or the present; and no representation of a future event, whether in the form of a promise or not, can be a pretense. *Dillingham v. State*, 5 Ohio

XI. The receiving of any chattel, money, valuable security, or other property (y) whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof amounts to felony, either at common law or by virtue of the Larceny Act, with knowledge that stolen goods, &c.

(y) By the 7 Will. 4 & 1 Vict. c. 36, s. 30, any person who shall receive a post-letter, or post-letter bag, or any chattel, money, or valuable security, the stealing whereof is a felony by the statute, knowing it to have been feloniously stolen, and to have been sent, or intended to be sent, by the post, is guilty of felony, punishable with penal servitude for

life, or for not less than five years,—or imprisonment for not more than four years, with or without hard labour, and with or without solitary confinement.

As to receiving materials embezzled by persons employed in certain manufactures, see 6 & 7 Vict. c. 40, ss. 4, 5, 11.

St. 280; *McKenzie v. State*, 6 Eng. (Ark.) 594; *Burrow v. State*, 7 id. 65; *Tefft v. Windsor*, 17 Mich. 486; *State v. Evers*, 49 Mo. 542. See *Com. v. Henry*, 10 Harr. (Penn.) 253; *People v. Stetson*, 4 Barb. 151; *Ramsey v. People*, 22 N. Y. (8 Smith) 413. But the pretense need not be in words. It may be gathered from the acts of the party (*Com. v. Drew*, 19 Pick. [Mass.] 179; *Maley v. State*, 31 Ind. 192; *Cheek v. State*, 1 Cold. [Tenn.] 172); and it need not be such as cannot be guarded against by persons of ordinary prudence. *State v. Mills*, 17 Me. 211, 218; *People v. Huynes*, 14 Wend. 546, 557; *Moore v. Turbeville*, 2 Bibb (Ky.), 602. But see *Skiff v. People*, 2 Park. 147; *Com. v. Wilgus*, 4 Pick. (Mass.) 177; *People v. Williams*, 4 Hill, 9.

A common illustration of false pretense is where one represents himself or his firm to be solvent, or to be indebted only so much (*State v. Pryor*, 30 Ind. 350), or to be worth so much money, knowing the facts to be otherwise (*People v. Haynes*, 11 Wend. 557; *Com. v. Davidson*, 1 Cush. [Mass.] 33); or falsely pretends to have a particular fund in his own hands (*Com. v. Burdick*, 2 Barr [Penn.], 163; *People v. Kendall*, 25 Wend. 399) or another's (*People v. Herrick*, 13 Wend. 87), and thus gains a credit. So, falsely personating another, or assuming a false name, is a false pretense; provided the fraud intended is thereby effected. *Com. v. Wilgus*, 4 Pick. (Mass.) 177; *Com. v. Drew*, 19 Pick. (Mass.) 179; *People v. Peacock*, 6 Cow. 72. And, a representation, which is untrue, of being authorized to get money or goods for a person, is a false pretense. *People v. Johnson*, 12 Johns. 292; *Com. v. Hulbert*, 12 Metc. (Mass.) 446; *Tyler v. State*, 2 Humph. (Tenn.) 37.

To constitute the complete offense of false pretense, the fraud intended must be accomplished (see *Com. v. Drew*, 19 Pick. [Mass.] 179; *Fenton v. People*, 4 Hill, 126; *People v. Gates*, 13 Wend. 311; *People v. Genung*, 11 id. 18); and the false pretense must be the controlling influence in effecting the cheat. *Com. v. Drew*, 19 Pick. (Mass.) 179; *People v. Haynes*, 11 Wend. 557; *People v. Tompkins*, 1 Park. 224; *Com. v. Davidson*, 1 Cush. (Mass.) 33. So, the false pretense must be believed by the person to whom it is addressed (see *People v. Herrick*, 13 Wend. 87; *People v. Stetson*, 4 Barb. 151; *In re Greenough*, 31 Vt. 279); and it must have been made before the fraud was fully effected, or the bargain closed. *State v. Tomlin*, 5 Dutch. (N. J.) 14; *State v. Vanderbilt*, 3 id. 334; *People v. Haynes*, 11 Wend. 557.

Where one is induced by false pretenses to pay a just debt, actually due, no indictment will lie, because no injury has been done. *People v. Thomas*, 3 Hill, 169. But it is otherwise of a debt not due. *People v. Smith*, 5 Park. 490.

An intent to defraud is essential in this offense (*Com. v. Drew*, 19 Pick. [Mass.] 179); but such intent may be inferred from the act. *People v. Herrick*, 13 Wend. 87. See *People v. Getchell*, 6 Mich. 287; *Scott v. People*, 62 Barb. 62. Loose talk (*State v. Phifer*, 65 N. C. 321; *Com. v. Henry*, 10 Harr. [Penn.] 256) or the bragging statement of mere matter of opinion (see *State v. Tomlin*, 5 Dutch. [N. J.] 13), is held not to be within the statute. And so of mere "puffs." See *State v. Estes*, 46 Me. 150; *People v. Oriesie*, 4 Denio, 525; *In re Greenough*, 31 Vt. 279.

A false pretense made to the agent, and acted on by the principal, is a false pretense to the latter. See *Com. v. Harley*, 7 Metc. (Mass.) 462; *Com. v. Call*, 21 Pick. (Mass.) 515. So, the person obtaining the money or goods need not be acting on his own account, nor need it appear that he derived, or expected to derive, personally, any pecuniary or other benefit therefrom. *Com. v. Harley*, 7 Metc. (Mass.) 462; *Cowen v. People*, 14 Ill. 848.

* the same was feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, is felony (z). And the receiving, with such [* 310] guilty knowledge, of any property, the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanor by that act, is a misdemeanor (a).

The offence of receiving stolen goods with a guilty knowledge is sometimes not easily to be distinguished from larceny, and the same evidence may point to the commission of either crime. Thus, on a trial for larceny recent possession of the chattel charged to have been stolen—if unexplained and unaccounted for—is often relied upon for the prosecution as cogent proof of guilt—proof whence the jury may infer the ingredients necessary to the constitution of the crime specified, viz., the taking, the felonious intent, and the asportation (b). A chattel shown to have passed out of the custody or possession of the rightful owner in some illegal manner may, however, have reached the hands of the accused, supposing him to have been criminally implicated in the transaction, in one or other of two ways—by his larcenous taking and asportation of the chattel, or by his receipt of it, knowing it to have been stolen. It will be for the jury to determine the nature and quality of the act from the facts in evidence before them (c). (718)

* XII. Forgery, or the *crimen falsi*, an offence which was punished by the civil law with deportation or banishment, sometimes [* 311]

with death (d), may with us be defined (at common law) to be, XII. Forgery. —the fraudulent making or alteration of a writing to the prejudice of another man's right (e).

To constitute a forgery—(1) It is not necessary that the whole instrument should be fictitious. The making of a fraudulent insertion, alteration, or erasure, in any material part of a genuine document, by which another may be defrauded; the fraudulent application of a false signature to a true instrument, or a real signature to a false one, will suffice (f). (2) The very essence of

(z) 24 & 25 Vict. c. 96, s. 91. Punishment: penal servitude for not more than fourteen nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

A count for feloniously stealing property may be joined with a count for feloniously receiving it. Sect. 92.

(a) Sect. 95. Punishment: penal servitude for not more than seven nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping. See also s. 87.

(b) *Ante*, pp. 279—281.

(c) See *Reg. v. Langmead*, L. & C. 427.

(d) Inst. 4. 18. 7.

(e) As to forgery at common law, see *R. v. Hales*, 17 St. Tr. 161; *Reg. v. Sharman*, Dears.

285; *Reg. v. Moah*, Dears. & B. 550; *Reg. v. Cross*, *Id.* 460.

(f) 1 Hale, P. C. 683—5.

The instrument, however, must, in itself, be false; if a man merely pass for another, who is the maker or indorser of a true instrument, this is no forgery, though it may be within the statute of false pretences. *R. v. Hevey*, 1 Leach, 229. The spurious instrument must bear a resemblance to that for which it is put forth, but need not be perfect or complete; it is sufficient if it is calculated to impose on mankind in general, though a skilled person would detect its fallacy, 2 East. P. C. 950. *R. v. Mazagora*, Russ. & Ry. C. C. 291; *R. v. Sheppard*, *Id.* 69.

If the false making of the instrument be proved, the intent to defraud will be a necessary inference; *Reg. v. Hill*, 8 C. & P. 274; *Reg. v. Cooke*, *Id.* 582; *Reg. v. Geach*, 9 C. & P. 499.

(718) Generally in the United States, as well as in England, the offense of receiving stolen goods has, by legislation, been made a substantive one, and is punishable either as felony or as misdemeanor. See *State v. Sanford*, 1 Nott & McCord (S. C.), 512; *State v. Coppenburg*, 2 Strobb. (S. C.) 273; *People v. Wiley*, 8 Hill, 194; *Gwaggerty v. State*, 9 Yerg. (Tenn.) 338; *State v. Ives*, 18 Ired. (N. C.) 338; *State v. Weston*, 9 Conn. 527; *Com. v. Frye*, 1 Va. Cas. 19; *State v. Harkness*, 1 Brev. (S. C.) 276.

forgery is an intent to defraud, though no damage need result from it (*g*); the mere imitation of another's writing, the assumption of a name, or the alteration of a written instrument, where no person can be injured, does not come within the definition of this offence. (3) The question as to intent is for the jury, and it is now sufficient, in an indictment for "forging, altering, uttering, offering, disposing of, or putting off" (*h*) an instrument where it [* 312] * is necessary to allege an intent to defraud, to allege that the party accused did the act with such intent without alleging an intent to defraud a particular person; and on the trial for any such offence it is sufficient to prove that the accused did the act charged with an intent to defraud (*i*). (4) An instrument may be described in an indictment for forging or uttering it by any name or designation by which the same may be usually known, without setting out any copy or fac-simile thereof (*k*). (719)

(*g*) *R. v. Ward*, 2 Ld. Raym. 1461; 3 Stra. 747.

(*h*) To satisfy the above words it is necessary that the instrument forged should be parted with, or tendered, or offered, or used in some way to get money on credit upon it. Delivering a box, containing, among other

things, forged stamps, to the party's own servant, to be forwarded by a carrier to a customer in the country, is an uttering. *R. v. Collicott*, Russ. & Ry. C. C. 212; 4 Taunt. 300.

(*i*) 24 & 25 Vict. c. 98, s. 44.

(*k*) Sect. 42.

(719) Forgery, as defined by an American author, "is the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." 2 Bish. Crim. Law, § 523. See *State v. Thompson*, 19 Iowa, 299, 308; *State v. Pierce*, 8 id. 231, 235; *State v. Kimball*, 50 Mo. 411; *Penn. v. M'Kee*, Addison (Penn.), 33; *Com. v. Woods*, 10 Gray (Mass.), 477. The false making, with intent to defraud, is the gist of the offence. *Com. v. Ladd*, 15 Mass. 526; *Com. v. Chandler*, Thach. C. C. 187.

At common law, forgery is a misdemeanor; but under the statutes of forgery, particular species of the offence are made felonies. See *State v. Cheek*, 13 Ired. 114; *Com. v. Ray*, 3 Gray (Mass.), 441; *State v. Rowe*, 8 Rich. (S. C.) 17; *Perdue v. State*, 2 Humph. (Tenn.) 494; *Hess v. State*, 5 Ohio, 5; *Lewis v. Com.*, 2 Serg. & R. (Penn.) 551. The crime may be against the government of the State, the government of the United States, or both. *State v. Pitman*, 1 Brev. (S. C.) 32; *In re Truman*, 44 Mo. 181; *U. S. v. Britton*, 2 Mason's C. C. 464. If against the United States, it is punishable only under the acts of congress.

When a particular act is made forgery by statute, which was such at common law, the offender may be prosecuted either under the statute, or at common law. *State v. Jones*, 1 McMullan (S. C.), 236. But see *Com. v. Ayer*, 3 Cush. (Mass.) 150; *Com. v. Ray*, 3 Gray (Mass.), 441, 448. But if the statute makes a particular forgery felony, which at common law was only a misdemeanor, it can be proceeded against only under the statute. See *Johnson v. State*, 5 Dutch. (N. J.) 453; *Com. v. Roby*, 12 Pick. (Mass.) 496; *Com. v. Parr*, 5 Watts & S. (Penn.) 845. In the interpretation of the statute, the principles of the common law are applicable.

Among the instruments which may be the subject of forgery at common law are bonds (*Penn. v. Misner*, Add. [Penn.] 44; *Com. v. Linton*, 2 Va. Cas. 476), bills of exchange or promissory notes (*Butler v. Com.*, 12 Serg. & R. [Penn.] 237; *Com. v. Ward*, 2 Mass. 397), receipts (*Barnum v. State*, 15 Ohio, 717; *Com. v. Ladd*, 15 Mass. 526; *People v. Hoag*, 2 Park. 36; *Snell v. State*, 2 Humph. [Tenn.] 347), orders for the delivery of money or goods (*State v. Holly*, 2 Bay [S. C.], 262; *Harrie v. People*, 9 Barb. 664; *Com. v. Ayer*, 3 Cush. [Mass.] 150), entries in book accounts (*Biles v. Com.*, 8 Casey [Penn.], 529; *State v. Young*, 46 N. H. 266), letters of credit (*Ames' Case*, 2 Greenl. [Me.] 365), and many similar things. So, the counterfeiting or altering of any judicial process is forgery. Thus, an order from a magistrate for the discharge of a prisoner may be the subject of forgery (*Com. v. Mycall*, 2 Mass. 136); and so, of a deposition to be used in the trial of a cause. *State v. Kimball*, 50 Mo. 409. See *People v. Cady*, 6 Hill, 490; *State v. Smith*, 8 Yerg. (Tenn.) 150.

All tickets on which the obligor may be held responsible, as railway tickets, tickets to concerts, theatres, etc., and even free passes, may be the subjects of forgery. *Com. v. Ray*, 3 Gray (Mass.), 441. And in short, all written or other instruments which may be the

Forgery, though amenable to punishment at common law, is now mainly regulated by statute; the 23 & 24 Vict. c. 98, containing provisions applicable

foundation of a legal liability, may be the subject of this offense. *State v. Jones*, 1 Bay (S. C.), 207; *Foulkes v. Com.*, 2 Rob. (Va.) 886; *People v. Harrison*, 8 Barb. 560; *Ames' Case*, 2 Greenl. (Me.) 365; *Barnum v. State*, 15 Ohio, 717; *People v. Galloway*, 17 Wend. 540; *Com. v. Ayer*, 3 Cush. (Mass.) 150; *State v. Smith*, 8 Yerg. (Tenn.) 150; *People v. Cady*, 6 Hill, 490. And the act may be none the less forgery, though the person purporting to be the maker or obligor, or otherwise chargeable in the instrument, is a mere fictitious name. *Com. v. Chandler*, Thach. C. C. 187; *People v. Peabody*, 25 Wend. 472; *State v. Givens*, 5 Ala. 747; *Sasser v. State*, 18 Ohio, 453; *Henderson v. State*, 14 Texas, 508; *State v. Huyden*, 15 N. H. 355. See *Buckland v. Com.*, 8 Leigh (Va.), 782; *White v. Com.*, 4 Binn. (Penn.) 418.

Forgery may be committed in many ways independently of pen and ink; as by printing (*Com. v. Ray*, 8 Gray [Mass.], 441); by pasting one name over another name (*State v. Robinson*, 1 Harr. [Del.] 507); by the use of another's seal; or by engraving, etc. (*People v. Rhoner*, 4 Park. 166).

To alter the dates, names, or other material parts of an instrument, whereby its legal effect is in any degree varied, is sufficient in forgery. Thus, it is forgery to fraudulently alter the amount in a bill or note (*State v. Woodard*, 20 Iowa, 541; *Haynes v. State*, 15 Ohio St. 455; *Goodman v. Eastman*, 4 N. H. 455; *State v. Waters*, 8 Brev. [S. C.] 507); to alter the date of a promissory note or order (*People v. Graham*, 6 Park. 185; *State v. Kattleman*, 35 Mo. 105; *Miller v. Gilleland*, 19 Penn. St. 119); to alter a receipt on a note (*Kegg v. State*, 10 Ohio, 76); to insert a solvent banker's name in place of one who had failed (*State v. Robinson*, 1 Harr. [N. J.] 507); or to erase one signature or indorsement, and insert another. *Id.*; *State v. Waters*, 8 Brev. (S. C.) 507; *State v. Hitchens*, 2 Harr. (Del.) 527; *Com. v. Ladd*, 15 Mass. 526. See further illustrations, *Hove v. Thompson*, 2 Fairf. (Me.) 152; *White v. Hase*, 82 Ala. 430. As to immaterial alterations, see *Hunt v. Adams*, 6 Mass. 519; *State v. Gherkin*, 7 Ired. (N. C.) 206; *Burkholder v. Laph*, 7 Casey (Penn.), 822. It is not forgery to destroy an instrument. See *Com. v. Hayward*, 10 Mass. 84; *State v. Thornburg*, 6 Ired. (N. C.) 79; but it is otherwise, as to a fraudulent abrasure, mutilation, or severance, which materially changes the terms of an instrument. *State v. Stratton*, 27 Iowa, 420. See *State v. McSeran*, 1 Aiken (Vt.), 811; *Thornburg v. State*, 6 Ired. (N. C.) 79.

A writing invalid on its face cannot be the subject of forgery. *People v. Harrison*, 8 Barb. 560. See *Paige v. People*, 3 Abb. Ct. App. 439. Thus it is not indictable to forge a will attested by a less number of witnesses than the law requires. *State v. Smith*, 8 Yerg. (Tenn.) 150. And see *People v. Wilson*, 6 Johns. 820; *State v. Jones*, 1 Bay (S. C.), 207; *Crofts v. People*, 2 Scam. (Ill.) 442; *Com. v. Linton*, 2 Va. Cas. 476. But where a false instrument is good on its face, and its invalidity is to be made out by the proof of some extrinsic fact, in such case the forging of an instrument is a crime. *People v. Galloway*, 17 Wend. 540; *State v. Fitzsimmons*, 80 Mo. 236. See *Com. v. Ray*, 8 Gray (Mass.), 441; *People v. Shull*, 9 Cow. 778; *Butler v. State*, 22 Ala. 43. The forgery of an unstamped instrument, which, under the laws of the United States, requires a stamp, is equally indictable with one which is duly stamped. See *People v. Frank*, 28 Cal. 507; *Dudley v. Wells*, 55 Me. 145; *State v. Young*, 47 N. H. 402; *Carpenter v. Snelling*, 97 Mass. 452; *Cross v. People*, 47 Ill. 152; *State v. Haynes*, 6 Cold. (Tenn.) 550. Where a man forges the name of another person real or fictitious, he will not be excused on the ground that the name happens to be identical with his own. *Barfield v. State*, 29 Ga. 127; *People v. Peacock*, 6 Cow. 72.

The bare making of a false instrument with the intent to defraud some one is alone sufficient to constitute the offense of forgery. *Com. v. Ward*, 2 Mass. 897; *State v. Holly*, 2 Bay (S. C.), 262. It need not be shown that the prosecutor was actually defrauded (*Hess v. State*, 5 Ohio, 12; *Com. v. Ladd*, 15 Mass. 526; *People v. Fitch*, 1 Wend. 198; *State v. Humphreys*, 10 Humph. [Tenn.] 442; *State v. Pierce*, 8 Iowa, 231); and there need be no uttering. *Com. v. Ladd*, 15 Mass. 526.

The attempt to cheat by means of a forged instrument is, in law, called an "uttering" (*Com. v. Searle*, 2 Binn. (Penn.) 832); and to constitute this offense it need not be shown that the defendant was implicated in the forgery. *Brown v. Com.*, 8 Mass. 59; *Com. v. Houghton*, 8 id. 107. See *State v. Morgan*, 2 Dev. & Bat. (N. C.) 348; *Spencer v. Com.*, 2 Leigh (Va.), 751; *U. S. v. Britton*, 2 Mason's C. C. 464.

to every conceivable kind of forgery. Of these many are specified in the ensuing pages, either briefly or at length, regard being had to their character and practical importance. By this statute are constituted felonies:—

1. The forging any transfer of stock, whether public or of any body corporate, or any power of attorney relating thereto (*l*).

2. The personating an owner of stock, and transferring or receiving or endeavouring to transfer or receive the dividends thereupon, as if such offender were the true and lawful owner (*m*).

3. The forging an attestation to a power of attorney for the transfer of stock, or receipt of dividends (*n*).

[* 313] * 4. The making any false entry in the books of the public funds (*o*).

5. The making out of a false dividend warrant or warrant for the payment of money by any clerk or servant of the Bank, with intent to defraud (*p*).

6. The forging of any East India bond (*q*) or Exchequer bill (*r*).

Likewise will be adjudged guilty of felony any person:

7. Who, without lawful authority or excuse (proof whereof lies on the party accused), makes, causes to be made, or assists in making, or knowingly has in his "custody or possession" (*s*), any frame, mould, or instrument having therein any words, letters, marks, or devices peculiar to and appearing in the substance of paper used for Exchequer bills, or any machinery or plate peculiarly employed for printing such bills (*t*).

[* 314] * 8. Who, without lawful authority or excuse (proof whereof shall lie on the party accused), makes, causes to be made, or assists in making paper in imitation of that used for Exchequer bills (*u*).

(*l*) Sect. 2. Punishment: penal servitude for life or for not less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

In all cases of felonies mentioned in the Forgery Act, the court may, if it think fit, require the offender on conviction to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any of the punishments thereby authorised; provided that no person be imprisoned in default of finding sureties for more than one year. Sect. 51.

(*m*) Sect. 3. Punishment: *ut supra*.

(*n*) Sect. 4. Punishment: penal servitude for not more than seven nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

(*o*) Sect. 5. Punishment: penal servitude for life or for not less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

(*p*) Sect. 6. Punishment: penal servitude for not more than seven nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

(*q*) Sect. 7. Punishment: penal servitude for life or for not less than five years,—or imprisonment for any term not exceeding

two years, with or without hard labour, and with or without solitary confinement.

(*r*) Sect. 8. Punishment: *ut supra*.

(*s*) By s. 45 the words "having any matter in the custody or possession of any person" are satisfied, if the accused has such matter in his personal custody or possession, or knowingly and wilfully has it in the actual custody or possession of any other person, or knowingly and wilfully has it in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter be so had for his own use or for the use or benefit of another.

As to the difficulties attending the idea of guilty possession, see *Reg. v. Sleep*, L. & C. 44; *Reg. v. Weeks*, *Id.* 18; *Reg. v. Cohen*, 8 Cox, C. C. 41.

(*t*) Sect. 9. Punishment: penal servitude for not more than seven nor less than five years,—or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

(*u*) Punishment: *ut supra*.

By s. 11, whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall purchase or receive, or knowingly have in his custody or possession, any paper, plates, or dies to be used for exchequer bills, &c., shall be guilty of a mis-

Affecting ordinary instruments (*x*) the undermentioned acts are likewise constituted felonies:

9. The forging or uttering, knowing the same to be forged, any bank note, bank bill of exchange, or bank post bill, or any indorsement thereon or assignment thereof, with intent to defraud (*y*).

10. The purchasing, receiving, or possessing, without lawful authority or excuse (proof whereof lies on the party accused), any such forged note or bill, knowing the same to be forged (*z*).

11. The making, using, or possessing, without lawful authority or excuse (proof whereof lies on the party accused), any mould, or instrument for the making of paper, in imitation of, or intended to resemble, that used * by [* 315] the Bank, or disposing of, or having in possession, such paper (*a*).

12. The engraving or possessing any plate for making bank notes, or uttering or possessing paper upon which a blank bank note is printed (*b*).

13. The engraving on a plate, any word, number, or device resembling part of a bank note, or possessing any such plate, or uttering or possessing paper on which any such matter is impressed (*c*).

14. The making or possessing any mould for making paper with the name of any banker, visible therein, or making or possessing such paper (*d*).

15. The engraving on any plate a foreign bill or note, or using or possessing such plate, or uttering paper on which any part of such bill or note is printed (*e*).

In regard, also, to instruments such as deeds, wills, bills of exchange, and so forth, any person is guilty of felony:

1. Who, with intent to defraud, forges, alters, or utters, knowing the same to be forged or altered, any deed, bond, or writing obligatory, or any assignment at law or in equity thereof, or forges any name, handwriting, or signature purporting to be that of a witness attesting the execution thereof, or utters any such deed having thereon any such forged name, handwriting, or signature, knowing the same to be forged (*f*).

2. Who, with intent to defraud, forges, alters, or utters, knowing the same to be forged or altered, any testamentary instrument (*g*).

3. Who forges, alters, or utters, knowing the same * to be forged [* 316] or altered, any bill of exchange, or any acceptance, indorsement, or assignment thereof, or any promissory note for the payment of money, or any indorsement or assignment thereof (*h*), or any undertaking, order, or request

demeanor, punishable by imprisonment for not more than three years, with or without hard labour.

By s. 51, whenever any person is convicted of a misdemeanor under the Forgery Act, the court may, if it think fit, in addition to or in lieu of any of the punishments by the act authorised, fine the offender, and require him to enter into his own recognizances, and find sureties, both or either, for keeping the peace, and being of good behaviour.

(*z*) Of which the legal effect rather than the designation determines the character and punishment of the offence. See s. 39.

(*y*) Sect. 12. Punishment: penal servitude for life or for not less than five years,—or imprisonment for not more than two years,

with or without hard labour, and with or without solitary confinement.

(*z*) Sect. 13. Punishment: penal servitude for not more than fourteen nor less than five years,—or imprisonment for not more than two years, with or without hard labour.

(*a*) Sect. 14. Punishment: *ut supra*.

(*b*) Sect. 16. Punishment: *ut supra*.

(*c*) Sect. 17. Punishment: *ut supra*.

(*d*) Sect. 18. Punishment: *ut supra*.

(*e*) Sect. 19. Punishment: *ut supra*.

(*f*) Sect. 20. Punishment: penal servitude for life or for not less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

(*g*) Sect. 21. Punishment: *ut supra*.

(*h*) Sect. 22. Punishment: *ut supra*.

for the payment of money, or delivery of goods, or securities for the payment of money, or for procuring credit, or any indorsement on or assignment of any such undertaking, order, or request, or any receipt for money, goods, or securities for the payment of money, or any indorsement on, or assignment of any such receipt (*i*), with intent, in any of the cases aforesaid, to defraud.

4. Who, with intent to defraud, draws, makes, signs, accepts, or indorses any bill of exchange or promissory note, or any undertaking, order, or request, for the payment of money, or delivery of goods, or securities for money, by procuration, on account of any other person, without lawful authority or excuse, or utters any such bill, note, undertaking, order, or request so drawn, made, signed, accepted, or indorsed by procuration, without lawful authority or excuse, and with a guilty knowledge (*k*).

5. Who obliterates or alters any crossing on a cheque, or utters any cheque whereon any such obliteration or alteration has been made, knowing the same to have been made, with intent to defraud (*l*).

6. Who fraudulently forges, alters, or utters, knowing the same to be forged or fraudulently altered, any debenture issued under any lawful authority whatsoever, either within her majesty's dominions or elsewhere (*m*).

[* 317] *7. Who, with intent to defraud, demands, obtains, or causes to be delivered or paid to any person, any chattel, money, security for money, or other property, by virtue of a forged or altered instrument, knowing the same to be forged or altered, or by virtue of any probate or letters of administration, knowing the testamentary writing on which such probate or letters of administration were obtained to have been forged or altered, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit (*n*).

Although, as shown in preceding pages, many common species of forgery have been expressly defined by statute, others less often occurring have likewise thus been constituted, and so in regard to false personation, which is allied to forgery as well as to the offence of obtaining goods or money by false pretences, provisions are to be found in our statute roll. Of these enactments some few are below specified (*o*), and in regard to others the reader is referred to books of practice (*p*).

XIII. Malicious injury done to private property, not *animo furandi*, or with an intent of gaining by another's loss, but out of a spirit of wanton mischief or revenge, although only a trespass at common law, is by statute made penal in a high degree. Of malicious injuries the most serious, viz. arson, has been already considered (*q*); the others are divisible

XIII. Malicious injuries.

(*i*) Sect. 23. Punishment: *ut supra*.
 (*k*) Sect. 24. Punishment: penal servitude for not more than fourteen nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.
 (*l*) Sect. 25. Punishment: penal servitude for life or for not less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.
 (*m*) Sect. 26. Punishment: penal servitude for not more than fourteen nor less than five years,—or imprisonment for not more than

two years, with or without hard labour, and with or without solitary confinement.

(*n*) Sect. 38. Punishment: *ut supra*.

(*o*) As to frauds against the Transfer of Land Act (25 & 26 Vict. c. 53) see ss. 105, 138, 139; against the Declaration of Title Act, 1862 (25 & 26 Vict. c. 67), see ss. 44, 45.

As to false personation of seamen, see 28 & 29 Vict. c. 124, ss. 8, 9; of soldiers, 7 Geo. 4, c. 16, s. 38; 3 Will. 4, c. 53, s. 49.

(*p*) See a list of such statutes collected in Arch. Cr. Pl., 16th ed., pp. 558—565.

(*q*) *Ante*, p. 264.

so far as they come within the scope of these Commentaries, into two classes, such as are felonies and such as are misdemeanors.

* Within the former of these classes are comprised the following [* 318] acts when done unlawfully and maliciously—destroying hopbinds (*r*), destroying or damaging trees and shrubs growing in any park, garden, or ground belonging to a dwelling house, where the amount of injury done exceeds the sum of 1*l.* (*s*), or growing elsewhere, provided the amount of injury done exceeds 5*l.* (*t*), destroying fruit or any vegetable production in a garden, orchard, or conservatory after a previous summary conviction (*u*), causing water to run into a mine, or into any subterraneous passage communicating therewith, with intent thereby to damage such mine, or to hinder the working thereof, or with the like intent, pulling down, obstructing, or damaging with intent to destroy or render useless any airway, waterway, level or shaft belonging to the mine (*y*), damaging steam-engines, waggonways or tackle used for the working of mines (*z*), breaking down or damaging any sea-wall or bank of a reservoir or * canal (*a*), or removing the piles for securing the same, [* 319] or doing any injury with intent to obstruct the navigation thereof (*b*), destroying any public bridge or viaduct (*c*), placing anything on a railway, taking up any rail or sleeper, diverting points, or showing or removing any signal with intent in any of these cases to overthrow or injure any engine using such railway (*d*), and killing, maiming, or wounding cattle (*e*).

The following acts are also felonious:

The unlawfully masking, altering, or removing any light or signal, or

(*r*) 24 & 25 Vict. c. 97, s. 18. Punishment: penal servitude for not more than fourteen nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Under this act where an intent to injure or defraud is material, a general intent so to do may be laid and proved. Sect. 60.

(*s*) Sect. 20. Punishment: penal servitude for five years,—or imprisonment for not more than two years, with or without hard labour; and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*t*) Sect. 21. Punishment: *ut supra*.

Damaging trees wheresoever growing, to the amount of 1*s.*, is after two convictions constituted a misdemeanor, punishable by imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping. Sect. 22.

(*u*) Sect. 23. Punishment: *ut supra*, n. (*t*).

(*y*) Sect. 28. Punishment: penal servitude for not more than seven nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*z*) Sect. 29. Punishment: *ut supra*.

(*a*) Sect. 30. Punishment: penal servitude for life or for not less than five years,—or imprisonment for not more than two years,

with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen, with or without whipping.

(*b*) Sect. 31. Punishment: penal servitude for not more than seven nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*c*) Sect. 33. Punishment: penal servitude for life or for not less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*d*) Sect. 35. Punishment: penal servitude for life or for not more than five years,—or imprisonment for not more than two years, with or without hard labour, and, if a male under the age of sixteen, with or without whipping.

(*e*) Sect. 40. Punishment: penal servitude for not more than fourteen nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

By s. 41, the unlawfully and maliciously killing, maiming, or wounding any dog, bird, or animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or for any domestic purpose, is summarily punishable by a justice of the peace.

unlawfully exhibiting any false light or signal, with intent to bring a ship into danger, or unlawfully and maliciously doing anything tending to the immediate loss or destruction thereof, for which no punishment has been before specified (*f*), the unlawfully and *maliciously removing or [* 320] injuring any buoy or other sea mark (*g*), or destroying any part of a ship in distress, wrecked, or cast on shore, or goods thereto belonging (*h*).

Malicious injuries to property, which have by statute been constituted misdemeanors, comprise such as are done by tenants to houses or fixtures in their possession (*i*)—the breaking down the dam of a fishpond, or of any water being private property, or in which there is any private right of fishery, with intent thereby to take or destroy fish in such pond or water, or unlawfully and maliciously putting any noxious material therein, with intent to destroy the fish, or destroying the dam or floodgate of any reservoir, or pool (*k*)—the throwing down, or destroying any turnpike gate or toll bar, or any building, or weighing engine, erected for the better collection, ascertainment, or security of the toll (*l*)—the obstructing by any unlawful act, or by any wilful omission or neglect, any engine or carriage using any railway, or aiding or assisting [* 321] therein (*m*)—the unlawfully and maliciously injuring *any electric telegraph, or the machinery used in working it (*n*), or damaging any work of art in a museum, gallery, or repository to which the public are admitted, or any picture, monument, or ornament in a church, or other place of divine worship, or in any building belonging to the Queen, or to any county, city, parish, or place, or to any university, or inn of court, or in any street, square, burial ground, or public garden, or any statue or monument exposed to public view, or any railing, or fence surrounding it (*o*)—the unlawfully and maliciously doing any damage to real or personal property, either of a public or private nature, for which no punishment has been before specified, such damage being to an amount exceeding 5*l*. (*p*)—and the making, or knowingly having in one's possession, any gunpowder or other explosive substance, or

(*f*) Sect. 47. Punishment: penal servitude for life or for not less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*g*) Sect. 48. Punishment: penal servitude for not more than seven nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*h*) Sect. 49. Punishment: penal servitude for not more than fourteen nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement.

(*i*) 24 & 25 Vict. c. 97. Sect. 13. Punishment: fine or imprisonment, or both. By s. 59, every provision of the above act applies to any person who, with intent to injure or defraud another, does any of the acts thereby made penal, although the offender be in possession of the property against or in respect of which such act be done.

(*k*) Sect. 33. Punishment: penal servitude for not more than seven nor less than five years,—or imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

(*l*) Sect. 34.

(*m*) Sect. 36.

(*n*) Sect. 37. Punishment: imprisonment for not more than two years, with or without hard labour. The above offence is summarily punishable at the discretion of the justice before whom the charge is heard.

(*o*) Sect. 39. Punishment: imprisonment for not more than six months, with or without hard labour; and, if a male under the age of sixteen years, with or without whipping.

(*p*) Sect. 51. Punishment: imprisonment for not more than two years, with or without hard labour,—and in case such offence be committed between the hours of nine in the evening and six in the morning, penal servitude for five years,—or imprisonment for not more than two years, with or without hard labour.

noxious thing, or any machine, with intent by means thereof to commit any felony mentioned in the act concerning malicious injuries (*q*). (720)

XIV. Conspiracy—an offence of which we before briefly spoke—may be directed towards the commission of one or other of the criminal acts mentioned in the preceding pages. A conspiracy to rob (*r*), to obtain money by false *pretences (*s*), to cheat and defraud (*t*), is indictable, the conspiring together for [* 322] the purpose of effecting an illegal object being here the substantive offence. (721)

Such are the principal infringements of the rights of property: the last species of offences against individuals or private subjects, which the method of our distribution has led us to consider. We have before examined the nature of offences against the public, or commonwealth; against the sovereign or supreme magistrate, the head and protector of that community; against the universal law of civilized nations, together with some of the more atrocious offences, of publicly pernicious consequence, against God and religion. And these several heads seem to comprehend the whole circle of crimes, cognizable by the laws of England.

(*q*) Sect. 54. Punishment: imprisonment for not more than two years, with or without hard labour, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping.

(*r*) *R. v. M'Daniel*, 1 Leach, 45.

(*s*) *R. v. Gill*, 2 B. & Ald. 204; *Reg. v. Gompertz*, 9 Q. B. 824; *Reg. v. Hudson*, Bell, C.C. 263; *Reg. v. Kenrick*, 5 Q. B. 49.

(*t*) *Id.*

(720) The offense of malicious mischief has been denied a common-law existence in this country (see *State v. Wheeler*, 8 Vt. 344; *Black v. State*, 2 Md. 376; *Illies v. Knight*, 3 Texas, 312); which is, however, in conflict with the weight of authority.

Thus, an indictment is held to lie for maliciously, wickedly, and willfully killing a horse belonging to another (*Res. v. Teischer*, 1 Dall. [Penn.] 338; *State v. Council*, 1 Tenn. 305); or a dog (*State v. Latham*, 13 Ired. [N. C.] 83); or a cow (*People v. Smith*, 5 Cow. 253; *Com. v. Leach*, 1 Mass. 59); or a steer (*State v. Scott*, 2 Dev. & Bat. [N. C.] 85); or any beast whatever which may be the property of another. *Henderson's Case*, 8 Gratt. (Va.) 709; *Loomis v. Edgerton*, 19 Wend. 420.

So wanton cruelty to animals in general is held indictable. *State v. Briggs*, 1 Aiken (Vt.), 226; *U. S. v. Logan*, 2 Cranch's C. C. 259. And it has been maintained that all kinds of property, real and personal, may be the subject of this offense at common law (*Loomis v. Edgerton*, 19 Wend. 419. But see *State v. Robinson*, 3 Dev. & Bat. [N. C.] 130; *State v. Helmes*, 5 Ired. [N. C.] 864; *Brown's Case*, 3 Greenl. [Me.] 177); which restrict the offense to personal property. Under various statutes, however, in the United States, almost every species of property, real and personal, has been made the subject of it. See *Taylor v. State*, 6 Humph. (Tenn.) 285; *Com. v. Erskine*, 8 Gratt. (Va.) 624; *State v. Abbott*, 20 Vt. 537; *State v. Crenshaw*, 22 Mo. 457; *Boyd v. The State*, 2 Humph. (Tenn.) 39.

In a case of malicious mischief the act must proceed from malice (*State v. Doig*, 2 Rich. [S. C.] 179; *State v. Council*, 1 Tenn. 305; *Com. v. Walden*, 8 Cush. [Mass.] 558); which malice, it is said, must be against the owner of the property injured. *Wright v. State*, 30 Ga. 325; *State v. Latham*, 13 Ired. (N. C.) 83; *Hobson v. State*, 44 Ala. 380; *State v. Enslow*, 10 Iowa, 115; *United States v. Gideon*, 1 Minn. 292. But see *State v. Avery*, 44 N. H. 392; *Mosely v. State*, 28 Ga. 190; *State v. Hurd*, 51 N. H. 176.

At common law, the offense of malicious mischief is misdemeanor, and not felony. *Black v. State*, 2 Md. 376. But by statute it is sometimes felony, and in some cases misdemeanor. See *Com. v. Macomber*, 3 Mass. 254; *Black v. State*, 2 Md. 376; *Trimble v. Com.*, 2 Va. Cas. 143; *Britton v. Com.*, 1 Cush. (Mass.) 303.

(721) See *ante*, 427, note 662.

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*CHAPTER XV.

THE MEANS OF PREVENTING OFFENCES.

WE are now arrived at the fifth general branch, or head, under which I proposed to consider the subject of this Book of our Commentaries; viz. the means of preventing the commission of crimes and misdemeanors. And really it is an honour to our English laws, that they furnish a title of this sort; since preventive justice is, upon every principle of reason, of humanity, and of sound policy, preferable to punishing justice (*a*); the execution of which, though necessary, and in its consequences a species of mercy to the commonwealth, is attended with many harsh and disagreeable circumstances.

Preventive justice may consist—I. in the apprehending of persons at whom suspicious circumstances point as likely to commit crime; or, II. in requiring persons to find sureties for keeping the peace, or for their good behaviour; or, III. in making criminal the having in possession certain things presumably for the commission of crime; or, IV. in searching for the evidences of guilt, and seizing weapons or instruments the use or possession of which may scarcely be deemed compatible with innocence.

I. If a constable, or even a private person, see another on the point of committing treason or felony, or doing an act which would manifestly endanger the life of another, such constable or private person may lawfully lay hold on the individual thus acting, and detain him until it can be
I. Apprehension of suspected persons. [*324] *presumed that he has changed his purpose (*b*). When a felony is committed, or a dangerous wound is given, it is the duty of a bystander to arrest the offender (*c*), and a private person present at an affray may stay the affrayers until their heat is over, and then deliver them to a constable (*d*).

A constable or peace officer may take into custody, without a warrant, any person whom he shall find loitering in any highway, yard, or other place during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony mentioned in the act which concerns offences against the person, and shall take such suspected person as soon as reasonably may be, before a justice of the peace, to be dealt with according to law (*e*).

By s. 103 of the Larceny Act (24 & 25 Vict. c. 96), any person found committing an offence (*f*), punishable either upon indictment, or upon summary conviction, by virtue of the act, may be immediately apprehended without a warrant by any person, and any person to whom property suspected to have been stolen is offered, may apprehend the party offering it.

By s. 61 of the act concerning malicious injuries to property (24 & 25 Vict. c. 97), any person found committing an offence against that act may be appre-

(*a*) Beccar. ch. 41.

(*b*) 2 Hawk. P. C. c. 12, s. 19.

(*c*) 2 Hawk. P. C. c. 12, s. 1.

(*d*) Id. c. 18, s. 8. *Price v. Seeley*, 10 Cl. & F. 28.

(*e*) 24 & 25 Vict. c. 100, s. 66; see also 24 & 25 Vict. c. 96 (s. 104), c. 97 (s. 57).

(*f*) Except that of angling in the daytime.

hended without a warrant by a peace officer, or by the owner of the property injured, or his servant, and taken before a justice of the peace.

Also under s. 31 of the act which concerns offences against the coinage, it is lawful for any person whatsoever to apprehend one found committing an indictable offence * against the act, and to deliver him into the custody of a constable. [* 325]

Such are instances exemplifying the anxiety of our law to prevent the commission of crime at the risk even of needlessly interfering with the liberty of the person which it so highly prizes. To this part of our subject we shall revert when considering the mode in which a criminal proceeding is initiated (g).

II. The second kind of preventive justice above specified consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate and to give assurance to the public, that such offence as is apprehended shall not happen: by finding pledges or securities for keeping the peace, or for their good behaviour.

II. Sureties for the peace or good behaviour.

This requisition of sureties has been several times before mentioned as part of the penalty inflicted upon such as have been guilty of certain felonies and misdemeanors (h): but there also it must be understood rather as a caution against the repetition of the offence, than any immediate pain or punishment. And indeed, if we consider human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past: since, as was observed in a former chapter (i), punishments inflicted by temporal laws may be classed under three heads; such as tend to the amendment of the offender himself, or to deprive him of power to do future mischief, or to deter others by his example; all of which conduce to one and the same end, of preventing future crimes, whether that be effected by amendment, disability, or example. The caution, however, which we speak of at present, is such as is intended merely for prevention, without any crime actually committed by the party on whose behalf sureties are required, but arising only from a probable suspicion, that some crime is * intended or is likely to happen; and consequently it is not meant in any degree as punishment, unless perhaps for a man's imprudence in giving just ground of apprehension. [* 326]

Under the Saxon constitution sureties were always at hand, by means of the ancient institution of decennaries or frankpledges; whereby, as formerly observed (k), the whole neighbourhood or tithing of freemen became mutually pledges for each other's good behaviour. But this great and general security being now fallen into disuse, there has succeeded to it the method of making suspected persons find particular and special securities for their future conduct: of which we find mention in the laws of king Edward the Confessor (l); "*inveniat fidejussores de pace et legalitate tenendâ*" Let us therefore consider, first, what this security is; next, who may take or demand it; and lastly, how it may be discharged.

1. This security consists in being bound, with one or more sureties, in a

(g) *Post*, chap. 18; *ante*, pp. 206, 207.

(h) *Ante*, p. 268.

(i) *Ante*, chap. 1, p. 7.

(k) *Ante*, vol. i. p. 185.

(l) Cap. 18.

recognizance or obligation to the crown, entered on record, and taken in some court by some judicial officer; whereby the parties acknowledge themselves to be indebted to the crown in the sum required (for instance 100*l.*), with condition to be void and of none effect, if the party shall appear in court on such a day, and in the mean time shall keep the peace, or conditioned to keep the peace for a certain period (*m*), either generally, towards the queen and all her liege people; or particularly, also, with regard to the person who craves the security. Or, if it be for the good behaviour, then on condition that he shall demean and behave himself well (or be of good behaviour), either generally or specially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a justice of the peace, must be certified to the [* 327] next sessions in pursuance of the *statute 3 Hen. 7, c. 1, or, in a case of felony, to the assizes, pursuant to the statute 1 & 2 Ph. & M. c. 13; and if the condition of such recognizance be broken, by any breach of the peace in the one case, or any misbehaviour in the other, the recognizance becomes forfeited or absolute; and being estreated or extracted (taken out from among the other records) and sent up to the Exchequer (*n*), the party and his sureties, having now become the queen's absolute debtors, are sued for the several sums in which they are respectively bound. And it is now provided by the statute 16 & 17 Vict. c. 30, s. 2 (*o*), that where any recognizance to keep the peace, or to be of good behaviour, has been entered into by any person as principal or surety at quarter sessions, or before any justice or justices of the peace, the quarter sessions, upon application made to it, may declare such recognizance to be forfeited upon proof of a conviction of the party bound thereby, of any offence which is in law a breach of the condition of the same, and upon further proof that a notice in writing, signed by the person seeking to put the recognizance in force, has, seven clear days before the commencement of the sessions, been personally served upon, or left at the usual place of abode of the party, or each of the parties if more than one, who entered into such recognizance.

2. Justices of the peace, by virtue of their commission, or those who are *ex officio* conservators of the peace, as mentioned in a former volume (*p*), may demand such security according to their own discretion; or it may be granted at the request of any subject, upon due cause shown, provided such demandant be under the protection of the crown; for which reason it was formerly doubted, whether Jews, pagans, or persons convicted of *præmunire*, were entitled thereto (*q*). Or, if the justice is averse to act, it may be granted by [* 328] mandatory writ, called a **supplicavit*, issuing out of the court of queen's bench or chancery; which will compel the justice to act, as a ministerial and not as a judicial officer: and he must make a return to such writ, specifying his compliance, under his hand and seal (*r*). But this writ is seldom or never used: for when application is made to the superior courts, they usually take the recognizances there, under the directions of the statute 21 Jac. 1, c. 8. And indeed a peer or peeress cannot be bound over in any other place than the courts of queen's bench or chancery: though a justice of the

(*m*) *Prickett v. Gratrix*, 8 Q. B. 1020; *Willis v. Bridger*, 2 B. & Ald. 278.

(*n*) See 22 & 23 Vict. c. 21, ss. 38-40.

(*o*) See also the stats. 3 Geo. 4, c. 43, s. 4; 7 Geo. 4, c. 64, s. 31.

(*p*) *Ante*, vol. 1.

(*q*) 1 Hawk. P. C. 126.

(*r*) F. N. B. 80; 2 P. Wms. 202.

peace has a power to require sureties of any other person, being *compos mentis* and under the degree of nobility, whether he be a fellow justice or other magistrate, or merely a private man (*s*). Wives may demand it against their husbands; or husbands, if necessary, against their wives (*t*). But feme-coverts, and infants under age, ought to find security by their friends only, and not to be bound themselves: for they are incapable of engaging themselves to answer any debt; which, as we observed, is the nature of these recognizances or acknowledgments.

In default of finding sureties when required, the party against whom the application for them is made may be sent to prison, subject to the restriction imposed by the stat. 16 & 17 Vict. c. 30, s. 3, which enacts that "no person, committed to prison under any warrant or order of one justice of the peace for or on account of not entering into recognizances, or finding sureties to keep the peace, or to be of good behaviour, shall be detained under such warrant or order for more than twelve calendar months from the time of such commitment."

3. A recognizance duly given may be discharged, either by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which such * recognizance is certified by the justices (as the quarter sessions, assizes, or queen's bench), if they see sufficient cause; or [* 329] in case he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued (*u*).

Thus far what has been said is applicable to both species of recognizances, for the peace, and for the good behaviour, *de pace, et legalitate, tenendâ*, as expressed in the laws of king Edward. But as these two species of securities are in some respects different, especially as to the cause of granting, or the means of forfeiting them, I shall now consider them separately: and first, shall show for what cause such a recognizance, with sureties for the peace, is grantable; and then, how it may be forfeited.

1. Any justice of the peace may, *ex officio*, bind all those to keep the peace, who in his presence make any affray, or threaten to kill or beat another; or contend together with hot and angry words; or go about with unusual weapons or attendance, to the terror of the people; and all such as he knows to be common barrators; and such as are brought before him by the constable for a breach of the peace in his presence; and all such persons, as, having been before bound to the peace, have broken it and forfeited their recognizances (*x*). Also, wherever any private man has just cause to fear that another will burn his house, or do him a corporal injury, by killing, imprisoning, or beating him; or that he will procure others so to do; he may demand surety of the peace against such person: and every justice of the peace is bound to grant it, if he who demands it will make oath, that he is actually under fear of death or bodily harm; and will show that he has just cause to be so, by reason of the other's menaces, attempts, or having lain in wait for him; and will also further swear, that he does not require such surety out * of malice, or for [* 330] mere vexation (*y*). This is called swearing the peace against another;

(*s*) 1 Hawk. P. C. 127.

(*t*) 2 Stra. 1207; Fost. 359; Lord Vane's case, 13 East. 171.

(*u*) 1 Hawk. P. C. 129; 3 Geo. 4, c. 46, s. 6.

(*x*) 1 Hawk. P. C. 126.

(*y*) 1 Hawk. P. C. 127.

The surety of the peace will only be granted where there is a fear of some pres-

and if the party does not find such sureties, as the justice in his discretion shall require, he may immediately be committed till he does (z).

2. Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault, or menace, to the person of him who demanded it, if it be a special recognizance; or, if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace; or, more particularly, by any one of the many species of offences which were mentioned as crimes against the public peace in the tenth chapter of this Book; or, by any private violence committed against any of her majesty's subjects. But a bare trespass upon the lands or goods of another, which is a ground for a civil action, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance (a). Neither are mere reproachful words, as calling a man a knave or liar, any breach of the peace, so as to forfeit one's recognizance (being looked upon to be merely the effect of unmeaning heat and passion), unless they amount to a challenge to fight (b).

The other species of recognizance, with sureties, is for good behaviour. This includes security for the peace, and somewhat more; we will therefore examine it in the same manner as the other.

1. First, then, the justices are empowered by the statute 34 Edw. 3, c. 1, to bind over to the good behaviour towards the queen and her people, all them that be not of good fame, wherever they be found; to the intent that [* 331] the people be not troubled nor endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, "that be not of good fame," it is held that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem*: or for a libel calculated to cause a breach of the peace (c); or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and wake in the night; common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good fame: an expression, it must be owned, of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself (d). But, if he commits a man for want of sureties, he must express the cause thereof with convenient certainty; and take care that such cause be a good one (e).

2. A recognizance for the good behaviour may be forfeited by the same means, as one for the security of the peace may be; and also by some others. As, by going armed with unusual attendance, to the terror of the people; by speaking words tending to sedition; or by committing any of those acts of

ent or future danger, and not merely for a battery or trespass, or for any breach of the peace that is past. Dalt. c. 11.

(z) 1 Hawk. P. C. 128; *ante*, p. 328.

(a) Ibid. 131.

(b) Ibid. 130.

(c) *Haylock v. Sparks*, 1 E. & B. 471.

(d) Generally as to the jurisdiction (which is by no means well defined) of a magistrate in regard to requiring sureties for good behaviour, see judgment, *Haylock v. Sparks*, 1 E. & B. 485—488.

(e) 1 Hawk. P. C. 132.

misbehaviour, which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually * happen (*f*): for, though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended; [* 332] yet it would be hard, upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.

III. The third head under which preventive justice may be treated of, necessitates a reference to statutory provisions, rendering illegal, unless satisfactorily accounted for, the possession of certain things presum-
III. Criminal possession. ably for the commission of crime. In the recent Consolidation and Amendment Acts, many such provisions, of which some have been already noticed, are contained. To the constitution of such an offence, a criminal intent, or guilty knowledge, is sometimes made essential, whilst at other times it is not so (*g*). Clauses such as now alluded to are distinguishable from those which render the possession of property, if unexplained, presumptive evidence of antecedent crime.

IV. A warrant may in some cases be granted by a justice of the peace to search for and seize property suspected to have been stolen, sufficient ground
IV. Searching for stolen goods, &c. for suspicion having been shown (*h*). The searching for stolen goods under the warrant of a justice is said by Lord Camden (*i*) to have "crept into the law by imperceptible practice," and to be "guarded with much circumspection." A justice of the peace may also, under some other circumstances, in virtue of express enactment, exercise a like power, *ex. gr.*, he may issue a warrant to search for and seize explosive substances under the 24 & 25 Vict. c. 100, s. 65 (*k*)—and if any credible witness prove upon oath before him a * reasonable cause to suspect that any person [* 333] has in his possession or on his premises any property whatsoever, with respect to which an offence punishable under the Larceny Act has been committed, a warrant may be granted to search for such property, as in the case of stolen goods, and any person to whom such property is offered to be sold, pawned, or delivered, is required, having reasonable ground of suspicion, to apprehend the party offering the same, and to take him, together with the property, before a justice of the peace. A warrant may also be issued by a justice under the Forgery Act (24 & 25 Vict. c. 98, s. 46), to search for paper or implements employed in forging, and for forged instruments, and, under the act relating to coinage offences (24 & 25 Vict. c. 99, s. 27), for the discovery and seizure of counterfeit coin and coining tools (*l*). In the above as well as in other cases, which cannot here be particularised (*m*), a search warrant is allowed to be issued with a view to the prevention of crime, and the detection, perchance, of criminals. (722)

(*f*) 1 Hawk. P. C. 133.

(*g*) Compare 24 & 25 Vict. c. 100, s. 64; c. 99, ss. 5, 11; c. 98, ss. 10, 11, 13, 16, 17, 18, 19; c. 99, s. 23.

(*h*) See *Eles v. Smith*, 1 D. & R. 97.

(*i*) *Entick v. Carrington*, Broom, Const. L. 600.

(*k*) See also 24 & 25 Vict. c. 97, s. 55.

(*l*) As to the illegality of general warrants, see Broom, Const. L. pp. 525—623.

(*m*) See Burn, Justice of the Peace, tit. "Search Warrant."

(722) The subjects treated of in the foregoing chapter are matters of statutory regulation in the several States of the Union; and a knowledge of them is, therefore, to be sought in the statute book, and in works professedly treating of criminal law.

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*CHAPTER XVI.

COURTS OF CRIMINAL JURISDICTION.

THE sixth, and last, object of our inquiries will be the method of inflicting those punishments which the law has annexed to particular offences. In the discussion of which I shall, first, specify the several courts of criminal jurisdiction, wherein offenders may be prosecuted to punishment; and secondly, mention, in their natural order, and explain, the proceedings therein respectively.

In this inquiry, concerning courts of criminal jurisdiction, which will be very brief, I shall rank them according to their dignity, and begin with the highest of all; viz.:

I. The high court of parliament; which is the supreme court in the kingdom, not only for the making, but also for the execution of laws; by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attain particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made *pro re nata*, and by no means an execution of such as are already in being. (723) But an impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the kingdom (*a*). A commoner (*b*) as well as a peer may be impeached for any crime. And the lords usually, in case of the impeachment of a peer for treason, address the crown, to appoint a lord high steward, for the greater dignity and regularity of their proceedings, who is commissioned accordingly by the crown (*c*). The articles of impeachment are prepared and agreed to by the house of commons, and afterwards tried by the lords; who are in such cases considered not only their own peers, but as the

(*a*) 1 Hale, P. C. 150.

(*b*) On the 26th of June, 1689, Sir Adam Blair and four other commoners were impeached for high treason, in having published a proclamation of James II. On the 2nd of July a long report of precedents was produced, and a question was put to the judges whether the record, 4 Edw. 3, No. 6, was a statute. They answered, as it appeared to them by the copy, they believed it to be a statute; but if they saw the roll itself, they could be more positive. It was then moved to ask the judges, but the motion was negatived, whether by this record the lords were barred from trying a commoner for a capital

crime upon an impeachment of the commons. And they immediately resolved to proceed in this impeachment, notwithstanding the parties were commoners and charged with high treason. 14 Lords' Journ. p. 260. The impeachment was not prosecuted with effect, on account of an intervening dissolution of parliament, but the right of the commons to impeach a commoner was thus formerly recognized.

As to the proceedings in such a case, see the Introduction to the Speeches delivered at the impeachment of Warren Hastings, A.D. 1788, edited by Mr. Bond.

(*c*) 1 Hale, P. C. 850.

(723) As to the trial of impeachments, see *ante*, 394, note 647.

Special acts imposing punishments on particular persons are prohibited in the United States by the provisions of the national constitution. Const. U. S., art. 1, §§ 9, 10. See *Ex parte Garland*, 4 Wall. 333; *Cummings v. Missouri*, id. 277.

peers of the whole nation. This is a custom apparently derived to us from the ancient Germans; who in their great councils sometimes tried capital accusations relating to the public: "*licet apud concilium accusare quoque, et discrimen capitis intendre*" (d). And it has a peculiar propriety in the English constitution; which has much improved upon the ancient model imported hither from the continent. For, though in general the union of the legislative and judicial powers ought to be carefully avoided (e), yet it may happen that a subject, * intrusted with the administration of public affairs, [* 336] may infringe the rights of the people, and be guilty of such crimes, as the ordinary magistrate either dares not or cannot punish. Of these the representatives of the people, or house of commons, cannot properly judge; because their constituents are the parties injured; they can therefore only impeach. But before what court shall this impeachment be tried? Not before the ordinary tribunals, which might be swayed by the authority of so powerful an accuser. That branch of the legislature, therefore, which represents the people, brings its charge before the other branch, which consists of the nobility, who have neither the same interests nor the same passions as popular assemblies (f). Our constitution deems it proper that the nobility should judge, to insure justice to the accused; that the people should accuse to insure justice to the commonwealth. And hence, besides other extraordinary circumstances attending the authority of this court, there is one of a very singular nature, which was insisted on by the house of commons in the case of the earl of Danby in the reign of Charles II. (g)—and it is now enacted by statute 12 & 13 Will. 3, c. 2,—that no pardon under the great seal shall be pleadable to an impeachment by the commons of Great Britain in parliament.

II. The court of the lord high steward (h) is a court instituted for the trial of peers, indicted for treason or felony, or for misprision of either (i). The office of this great magistrate is very ancient; and was formerly hereditary, or at least held for life, or *dum bene se gesserit*: but now it is and has been for centuries past (k), granted *pro hac vice* only; and it has been the constant practice (and therefore seems now to have become necessary) to grant it to a lord of parliament, else he is incapable to try the * delinquent peer (l). When, therefore, such an indictment is found [* 337] by a grand jury of freeholders in the queen's bench, or at the assizes before the justices of *oyer and terminer*, it has to be removed by a writ of *certiorari* into the court of the lord high steward, which only has power to determine it. A peer may plead a pardon before the court of queen's bench, and the judges have power to allow it; in order to prevent the trouble of appointing a high steward, merely for the purpose of receiving such plea. But the accused may not plead, in that inferior court, any other plea: as "guilty," or "not guilty," but only in this court: because, in consequence of such plea, it is possible that judgment of death might be awarded against

(d) Tacit. de Mor. Germ. 12.

(e) *Ante*, vol. 1, p. 173.

(f) Montesq. Sp. L. xi. 6.

(g) Com. Jour. 5 May, 1679.

(h) 4 Inst. 58; 2 Hawk. P. C. 5, 421; 2 Jon. 54.

(i) 1 Bulstr. 198.

(k) Fryn. on 4 Inst. 46.

(l) *Quand un seigneur de parlement serra arrein de treason ou felony, le roy par ses lettres patents fera un grand et sage seigneur d'estre le grand seneschal d'Angleterre: qui doit faire un precept—pur faire venir xx seigneurs, ou xviii, &c.* (Yearb. 18 Hen. 8, 11.) See Staundf. P. C. 162; 3 Inst. 28; 4 Inst. 59; 2 Hawk. P. C. 5; Barr. 234.

him. The crown, therefore, in case a peer be indicted for treason, felony, or misprision of either, creates a lord high steward *pro hac vice* by commission under the great seal; which recites the indictment so found, and gives his grace power to receive and try it, *secundum legem et consuetudinem Angliæ*. Then, when the indictment is regularly removed, by writ of *certiorari*, commanding the inferior court to certify it up to him, the lord high steward directs a precept to a serjeant at arms, to summon the lords to attend and try the indicted peer. This precept was formerly issued to summon only eighteen or twenty, selected from the body of the peers: then the number came to be indefinite; and the custom was for the lord high steward to summon as many as he thought proper (latterly not less than twenty-three (*m*)), and that those lords only should sit upon the trial: which threw a monstrous weight of power into the hands of the crown and this its great officer, of selecting only such peers as the * then predominant party should most approve of. And [*338] accordingly, when the earl of Clarendon fell into disgrace with Charles II., there was a design formed to prorogue the parliament, in order to try him by a select number of peers; it being doubted whether the whole house could be induced to fall in with the views of the court (*n*). But now by statute 7 Will. 3, c. 3, upon all trials of peers for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned, at least twenty days before such trial, to appear and vote therein; and every lord appearing shall vote in the trial of such peer.

During the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward, but before the court last mentioned, of our lord the king, or of our lady the queen, in parliament (*o*). It is true, a lord high steward is always appointed in that case, to regulate and add weight to the proceedings: but he is rather in the nature of a speaker *pro tempore*, or chairman of the court, than the judge of it; for the collective body of the peers are therein the judges both of law and fact, and the high steward has a vote with the rest, in right of his peerage. But in the court of the lord high steward, which is held in the recess of parliament, he is the sole judge of matters of law, as the lords triers are in matters of fact; and as they may not interfere with him in regulating the proceedings of the court, so he has no right to intermix with them in giving any vote upon the trial (*p*). Therefore, upon the conviction and attainder of a peer for murder in full parliament, it has been held by the * judges (*q*), that in case the day [*339] appointed in the judgment for execution should lapse before execution done, a new time of execution may be appointed by either the high court of parliament during its sitting, though no high steward be existing; or, in the recess of parliament, by the court of queen's bench, the record being removed into that court.

It has been a point of some controversy, whether the bishops have now a right to sit in the court of the lord high steward, to try indictments of treason

(*m*) Kelynge, 56.

(*n*) Carte's Life of Ormonde, vol. 2.

(*o*) Fost. 141.

As to the procedure at the trial of a peer in parliament, see *The Trial of the Earl of Cardigan*, Townsend's St. Tr. i. 209; *The*

Trial of Lord Byron, 19 St. Tr. 1178; *The*

Trial of Earl Ferrers, Id. 886.

(*p*) *Trial of Lord Delamere*, 11 St. Tr. 523,

562—4.

(*q*) Fost. 139.

and misprision (r). Some incline to imagine them included under the general words of the statute of king William, "all peers, who have a right to sit and vote in parliament;" but the expression had been much clearer, if it had been all "lords" and not all "peers;" for though bishops, on account of the baronies annexed to their bishoprics, are clearly lords of parliament, yet, their blood not being ennobled, they are not universally allowed to be peers with the temporal nobility: and perhaps this word might be inserted purposely with a view to exclude them. However, there is no instance of their sitting on trials for capital offences, even upon impeachments or indictments in full parliament, much less in the court we are now treating of; for indeed they usually withdraw voluntarily, but enter a protest declaring their right to stay. It is observable that, in the eleventh chapter of the constitutions of Clarendon, made in parliament 11 Hen. 2, they are expressly excused, rather than excluded, from sitting and voting in trials, when they come to concern life or limb: "*episcopi, sicut ceteri barones, debent interesse judiciis cum baronibus, quousque perveniat ad diminutionem membrorum, vel ad mortem:*" and Becket's quarrel with the king hereupon was not on account of the exception (which * was agreeable to the canon law), but of the general rule, that [* 340] compelled the bishops to attend at all. And the determination of the house of lords in the earl of Danby's case (s), which has ever since been adhered to, is consonant to these constitutions: "that the lords spiritual have a right to stay and sit in court in capital cases, till the court proceeds to the vote of guilty, or not guilty." It must be noted that this resolution extends only to trials in full parliament: for to the court of the lord high steward (in which no vote can be given, but merely that of guilty, or not guilty) no bishop, as such, ever was or could be summoned; and though the statute of king William regulates the proceedings in that court, as well as in the court of parliament, yet it never intended to new-model or alter its constitution; and consequently does not give the lords spiritual any right in cases of blood which they had not before (t). And what makes their exclusion more reasonable is, that they have no right to be tried themselves in the court of the lord high steward (u), and therefore surely ought not to be judges there. For the privilege of being thus tried depends upon nobility of blood, rather than a seat in the house: as appears from the trials of popish lords, of lords under age, and (since the union) of the Scotch nobility, though not in the number of the sixteen; and from the trials of females, such as the queen consort or dowager, and of all peeresses by birth; a peeress by marriage also, unless she has, when a dowager, disparaged herself by taking a commoner for her second husband, is entitled to a like privilege (x).

Upon conviction for felony, a peer is now liable to the same punishment as any other subject of the crown (y), and for a misdemeanor, as libel, he is liable in like manner as a commoner (z).

(r) The lords spiritual may vote on a bill of attainder, see *The Proceedings against Sir John Fenwick*, 18 St. Tr. 750.

(s) *Lords' Journ.* 15 May, 1679.

(t) *Fost.* 248.

(u) *Bro. Abr. t. Trial.* 142.

(x) See, for instance, *The Duchess of Kingston's Case*, 20 St. Tr. 855.

(y) 4 & 5 Vict. c. 22.

(z) See *The Case of Lord Vaux* (1 Bulstr. 197), who was tried (*temp.* James I), for refusing to take the oath of allegiance to the crown, and thereby incurring the penalties of a *præmunire*.

[*341] *III. The court of queen's bench (*a*), concerning the nature of which we partly inquired in the preceding Book (*b*), is (we may remember) divided into a crown side, and a plea side. On the crown side, it takes cognizance of criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace.

III. Court of queen's bench. Into the court of queen's bench, also, indictments from inferior courts (*c*) may be removed by writ of *certiorari*, and tried either at bar, or at *nisi prius*. Though by the 16 & 17 Vict. c. 30, s. 4, it is enacted that no indictment (except against a body corporate not authorized to appear by attorney in the court in which the indictment is preferred) shall be so removed into the queen's bench or central criminal court, either at the instance of the prosecutor or of the defendant (other than the attorney-general acting on behalf of the crown), unless it be made to appear to the court from which the writ is to issue, by the party applying for it, that a fair and impartial trial of the case cannot be had in the court below, or that some question of law of more than usual difficulty and importance is likely to arise upon the trial, or that a view of the premises in respect whereof the indictment is preferred or a special jury may be required for the satisfactory trial of the same (*d*). Also, where an indictment for any felony or misdemeanor committed, or supposed to have been committed at any place out of the jurisdiction of the central criminal court, has been removed by *certiorari* * into the queen's bench, that [*342] court may order that it be tried at the central criminal court (*d*).

The judges of the court of queen's bench are the supreme coroners of the kingdom. And the court itself is the principal court of general criminal jurisdiction (though the two already noticed are of greater dignity) known to the laws of England. For which reason, by the coming of the court of queen's bench into any county (as it was removed to Oxford on account of the sickness in 1665), all former commissions of *oyer* and *terminer*, and general gaol delivery, are at once absorbed and determined *ipso facto*: in the same manner as by the old Gothic and Saxon constitutions, "*jure vetusto obtinuit, quievissent omnia inferiora judicia dicente jus rege*" (*e*).

It has been held, however, that the authority of a court of quarter sessions, whether for a county or a borough, is not in law determined or suspended by the coming of the judges into the county under their commission (*f*).

Into this court of queen's bench long since reverted all that was good and salutary of the jurisdiction of the court of star-chamber, *camera stellata* (*g*):

(*a*) As to the criminal jurisdiction of this court in general, see 4 Inst. 70; 2 Hale, P. C. 1, 7, 12, 13, 148; Hawk. P. C. b. 2, c. 8; Bac. Ab. Court of King's Bench, A.; Com. Dig. Courts, B. 1; 9 Rep. 118.

(*b*) *Ante*, vol. iii.

(*c*) The writ of *certiorari* for removing a cause from the Central Criminal Court must specify the county or jurisdiction in which the trial is to be, 9 & 10 Vict. c. 24, s. 3. See, also, 5 & 6 Will. 4, c. 83.

(*d*) An indictment for keeping a bawdy-house, a gaming-house, or other disorderly house is not removable by *certiorari*, 25 Geo. 2, c. 36, s. 10.

(*e*) 19 & 20 Vict. c. 16, s. 1.

(*f*) *Stiernhook*, l. 1, c. 2.

(*g*) *Smith v. Reg.*, 13 Q. B. 738.

In general the Sessions or Adjourned Sessions of the Peace are held at such times that the gaols may be cleared of the less serious classes of offenders before the judges of assize come round upon their circuits.

(*g*) Which is said (Lamb. Arch. 154), to have been so called from the Saxon word *freopan*, to steer or govern; or from its punishing the *crimen stellionatus*, or cosenage; or because the room wherein it sat, the old council-chamber of the palace of Westminster (Lamb. 148), was full of windows; or (to which Sir Edward Coke, 4 Inst. 66, accedes) because haply the roof thereof was at first garnished with gilded stars. As all these are merely conjectures (for no stars are said to have remained so late as the reign of Queen Elizabeth), it may be allowable to

which was a court of * very ancient origin (*h*), but new-modelled by statutes 3 Hen. 7, c. 1, and 21 Hen. 8, c. 20, consisting of divers [* 343] lords spiritual and temporal, being privy counsellors, together with two judges of the courts of common law, without the intervention of any jury. Their jurisdiction extended legally over riots, perjury, misbehaviour of sheriffs, and other notorious misdemeanors, contrary to the laws of the land. Yet, this was afterwards (as Lord Clarendon informs us (*i*)) stretched "to the asserting of all proclamations, and orders of state: to the vindicating of illegal * commissions, and grants of monopolies; holding for honourable [* 344] that which pleased, and for just that which profited, and becoming [* 344] both a court of law to determine civil rights, and a court of revenue to enrich the treasury; the council table by proclamations enjoining to the people that which was not enjoined by the laws, and prohibiting that which was not prohibited; and the star-chamber, which consisted of the same persons in different rooms, censuring the breach of and disobedience to those proclamations by very great fines, imprisonments, and corporal severities: so that any disrespect to any acts of state, or to the persons of statesmen, was in no time more penal, and the foundations of right never more in danger to be destroyed." For which reason the court of star-chamber was finally abolished by statute 16 Car. 1, c. 10, to the general joy of the whole nation (*k*).

IV. The high court of Admiralty held before the lord high admiral of England, or his deputy, styled the judge of the admiralty, is a court not only of

propose another conjectural etymology, as plausible, perhaps, as any of them. It is well known that, before the banishment of the Jews under Edward 1, their contracts and obligations were denominated *starr* or *starrs*, from a corruption of the Hebrew word *shotâr*, a covenant. (Tovey's Angl. Judaic. 33; Selden, Tit. of Hon. ii. 34; Uxor Ebraic. i. 14.) These *starrs*, by an ordinance of Richard 1, preserved by Hoveden, were commanded to be enrolled and deposited in chests under three keys in certain places; one, and the most considerable, of which was in the king's exchequer at Westminster; and no *starr* was allowed to be valid unless it were found in some of the said repositories. (Memorand. in Scacc. P. 6 Edw. 1, prefixed to Maynard's Year-book of Edw. 2, fol. 8; Madox, Hist. Exch. c. 7, ss. 4, 5, 6.) The room at the exchequer, where the chests containing these *starrs* were kept, was probably called the 'starr-chamber;' and when the Jews were expelled the kingdom, was applied to the use of the king's council, sitting in their judicial capacity. To confirm this, the first time the starr-chamber is mentioned in any record, it is said to have been situated near the receipt of the exchequer at Westminster; (the king's council, his chancellor, treasurer, justices, and other sages, were assembled *en la chambre des esteilles pres la rescript al Westminster*.—Rot. Claus. 41 Edw. 3, m. 18.) For in process of time, when the meaning of the Jewish *starrs* was forgotten, the word star-chamber was naturally rendered in law French, *les*

chambre des esteilles, and in law Latin *camera stellata*; which continued to be the style in Latin till the dissolution of that court.

Another explanatory derivation of star-chamber has been offered:—In one of the statutes of the university of Cambridge, the antiquity of which is not known, the word *starrum* is twice used for a schedule or inventory. The statute is entitled *De computatione procuratorum*, and it directs that *in fine computi fiat starrum per modum dividenda, in quo ponentur omnia remanentia in communi civitatis tam pignora quam pecunia, ac etiam arreragia et debita, ita quod omnibus constare poterit evidenter, in quo statu tunc universitas fuerit quoad bona, &c.* Stat. Acad. Cant. p. 32. Such inventories would be made at the king's exchequer, and the room where they were deposited might probably have been called the Star chamber.

(*h*) Lamb. Arch. 156.

(*i*) Hist. of Reb. Bks. 1 and 8.

(*k*) The just odium into which this tribunal had fallen before its dissolution, has been the occasion that few memorials have reached us of its nature, jurisdiction, and practice: except such as, on account of their enormous oppression, are recorded in the histories of the times. There are, however, to be met with some reports of its proceedings in Dyer, Croke, Coke, and other reporters of that age. See, also, Hudson's Treatise of the Court of Star-chamber, published at the beginning of the 2nd volume of Collectanea Juridica.

IV. Court of Admiralty. civil but also of criminal jurisdiction (*l*), though this latter branch of its jurisdiction, when founded, is now in fact usually exercised by other criminal courts pursuant to divers statutes. The court of Admiralty has cognizance of all crimes and * offences committed [* 345] either upon the sea, or on the coasts (*m*), out of the body or extent of any English county; and by statute 15 Ric. 2, c. 3, of death and mayhem happening in great ships being and hovering in the main stream of great rivers, below the bridges of the same rivers, which are then a sort of ports or havens; such as are the ports of London and Gloucester, though they lie at a great distance from the sea. But, as this court proceeded without a jury, in a method much conformed to the civil law, the exercise by it of a criminal jurisdiction was contrary to the genius of the law of England; inasmuch as a man might be there deprived of his life by the opinion of a single judge, without the judgment of his peers. And, besides, as innocent persons might thus fall a sacrifice to the caprice of a single man, so very gross offenders might, and did frequently, escape punishment: for the rule of the civil law is, how reasonably I shall not at present inquire, that no judgment of death can be given against offenders, without proof by two witnesses, or a confession of the fact by themselves. This was always a great offence to the English nation; and therefore in the eighth year of Henry VI. it was endeavoured to apply a remedy in parliament: which then miscarried for want of the royal assent. However, by the statute 28 Hen. 8, c. 15, it was enacted, that these offences should be tried by commissioners of *oyer* and *terminer*, under the king's great seal: namely, the admiral or his deputy, and three or four more (among whom two common law judges were usually appointed); the indictment being first found by a grand jury of twelve men, and afterwards tried by a petty jury: and that the course of proceedings should be according to the law of the land.

[* 346] * The above mentioned statute of Henry 8, merely altered the mode of trial in the Admiralty court, its jurisdiction still continuing to rest on the same foundations as before that statute; being regulated by the civil law, *et per consuetudines marinas*, grounded on the law of nations (*n*). The power of the commissioners appointed under the statute was however confined by it to treasons, felonies, robberies, murders, and confederacies; and thereupon the 39 Geo. 3, c. 37 (*o*), declaring it expedient that other offences committed on the high seas should be tried in like manner, enacted, that all offences there committed should be offences of the like nature and subject to the same punishment as if they had been committed upon the land, and should be tried in the same manner as the crimes enumerated in the 28 Hen. 8, c. 15, were directed to be tried. Moreover as persons tried for murder under

(*l*) As to the criminal jurisdiction of this court in general, see 4 Inst. 134, 147; 2 Hale, P. C. 11 to 20; Com. Dig. Admiralty, E. 1, and Bac. Abr. Court of Admiralty, D.

As to the judge of the Court of Admiralty, see 20 & 21 Vict. c. 77, s. 10.

(*m*) If a pistol be fired on shore, which kills a man at sea, the offence is properly triable under the admiralty jurisdiction, because the murder is, in law, committed where the death occurs; 1 East, P. C. 367; 2 Hale, P. C. 17, 20.

(*n*) Com. Dig. Admiralty, E. 5; per Sir J. Mansfield, C. J., *R. v. Depardo*, 1 Taunt. 29.

(*o*) The 46 Geo. 3, c. 54, enabled the crown to issue a commission for trying offences in the same manner in any of the colonies, and the provisions of that act were extended, by 57 Geo. 3, c. 53, to murders and manslaughter committed in places not within the dominions of the crown.

Offences committed by British seamen at foreign ports are brought within the jurisdiction of the admiralty by stat. 17 & 18 Vict. c. 104, s. 267.

this latter statute could not be found guilty of manslaughter, and, where the circumstances reduced the crime to manslaughter, were entirely acquitted, the same statute of Geo. 3 enacted that where persons tried for murder or manslaughter committed on the high seas were found guilty of manslaughter only, they should be subject to the same punishment as if they had committed such manslaughter upon the land. And the 7 & 8 Geo. 4, c. 28, s. 12, further enacted that all offences prosecuted in the high court of admiralty of England should, upon every first and subsequent conviction, be subject to the same punishment as if such offence had been committed upon the land. We may add that the statutes 28 Hen. 8, * c. 15, and 39 Geo. 3, c. 37, did not take away any jurisdiction as to the trial of offences which might [* 347] before have been tried in a court of common law.

Further provision has been made by various recent enactments for the trial of offences committed within the admiralty jurisdiction. By s. 22 of the stat. 4 & 5 Will. 4, c. 36, constituting the central criminal court (*p*), the justices and judges of oyer and terminer and general gaol delivery, named in and appointed by the commissions issued under the authority of that act, are empowered to inquire of, hear, and determine any offences committed or alleged to have been committed on the high seas, or other places within the jurisdiction of England, and to deliver the gaol of Newgate of persons committed thereto or detained therein for offences alleged to have been perpetrated upon the high seas, within the jurisdiction of the admiralty of England; and all indictments found, and trials and other proceedings had and taken, by and before the said justices and judges, are to be valid and effectual to all intents and purposes. Also by the 7 & 8 Vict. c. 2, s. 1 (*q*), all offences alleged to have been committed on the high seas, and other places within the Admiralty of England, may be enquired of, heard, and determined by the justices of assize, oyer and terminer, and general gaol delivery, and they are severally and jointly invested with all the powers which by any act are given to the commissioners named in any commission of oyer and terminer for the trying of offences committed within the Admiralty of England, and may deliver the gaol, in every county and franchise within the limits of their several commissions, of any person committed to or imprisoned therein for any offence alleged to have been committed upon the high seas. And by sect. 2, in all indictments preferred before the said justices and commissioners under that act, the venue laid in the margin shall be the same as if the * offence [* 348] had been committed in the county where the trial is had; and all material facts which, in other indictments, would be averred to have taken place in the county where the trial is had, shall, in indictments preferred and tried under that act, be averred to have taken place "on the high seas." And sect. 4 provides, that nothing in this act contained shall affect the jurisdiction belonging to the central criminal court for the trial of persons charged with offences committed on the high seas and other places within the admiralty of England, or to restrain the issue of any special commission under the 28 Hen. 8, c. 15, for the trial of such offenders, if need there be.

By the statute 18 & 19 Vict. c. 91, s. 21 (*r*), if any person being a British

(*p*) *Post*, p. 352.

(*q*) See *Reg. v. Serua*, 1 Den. C. C. 104.

(*r*) *Reg. v. Lopes*, *Reg. v. Sattler*, *Dearsl. &*

B. 525; *Reg. v. Lesley*, Bell, C. C. 220; *Reg. v. Bjornsen*, L. & C. 545.

subject charged with having committed any crime on board a British ship on the high seas or in any foreign port or harbour; or if any person not being a British subject charged with having committed any crime on board a British ship on the high seas, is found within the jurisdiction of any court of justice in her majesty's dominions, which would have had cognizance of such crime if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case, as if such crime had been committed within such limits. By stat. 30 & 31 Vict. c. 124, s. 11, if a British subject commit a crime on board a British ship, or on board a foreign ship to which he does not belong, any court in the Queen's dominions which would have had cognizance of such crime if committed on board a British ship within the limits of the ordinary jurisdiction of such court, is clothed with jurisdiction to hear and determine the case, as if such crime had been committed within the ordinary jurisdiction of the court.

Lastly, the indictable offences mentioned in each respectively of the Criminal [* 349] Law Consolidation and Amendment * Acts (s), when committed within the jurisdiction of the Admiralty, shall be deemed to be offences of the same nature and subject to the same punishment as if they had been committed on the land in England, and may be dealt with, inquired of, tried, and determined, in any county or place in England in which the offender may be apprehended, or be in custody, in the same manner in all respects as if the offence had been committed in that county or place. (724)

V. The Court for the "Consideration of Crown Cases Reserved" was constituted by the statute 11 & 12 Vict. c. 78, (intituled an Act for the further amendment of the administration of the Criminal Law,) of which sect. 1 enacts that when a person has been convicted of any treason, felony or misdemeanor, before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge or commissioner, or justices of the peace (t) before whom the case was tried, may, in his or their discretion, reserve any question of law for the consideration of the judges, and thereupon may respite execution of the judgment on such conviction, or postpone judgment until such question shall have been decided. By sect. 2, the

V. Court for
crown cases
reserved.

(s) 24 & 25 Vict. c. 96, s. 115; c. 97, s. 72; c. 98, s. 50; c. 99, s. 86; c. 100, s. 68.

As to the trial of an accessory to felony within the jurisdiction of the Admiralty, see 24 & 25 Vict. c. 94, s. 9—of offenders in the

colonies for crimes committed on the high seas, see 6 & 7 Vict. c. 94; 12 & 13 Vict. c. 96.

(t) These words include the recorder of a borough, *Reg. v. Masters*, 1 Den. C. C. 832.

(724) The judicial power of the United States extends to all cases of admiralty and maritime jurisdiction. Const. U. S., art. 3, § 2. And this jurisdiction is held to embrace locally not only the high seas, but all the internal navigable waters, as rivers and lakes, on which commerce is borne. *Frets v. Bull*, 12 How. (U. S.) 466; *Genesee Chief v. Fitzhugh*, 12 id. 443.

The federal courts have jurisdiction by statute not only of all piracies, revolts, homicides, robberies, and malicious injuries to vessels, and of other crimes on the high seas, by all persons without regard to nationality, but of offenses committed in American ships in foreign ports. And the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may be first brought. Act of April 30, 1790; 1 Stat. at Large, 113, § 8. See *Ex parte Bollman*, 1 Cranch, 373; *U. S. v. Furlong*, 5 Wheat. 188; *U. S. v. Palmer*, 8 id. 610.

judge, or commissioner, or court of quarter sessions, is required to state, in a case to be transmitted to the judges, the questions of law (*u*) reserved, together with the special circumstances upon which they have arisen, and such case will be heard and determined by the court of criminal appeal constituted as below stated (*z*).

* VI. Courts of oyer and terminer, and general gaol delivery (*a*) [** 350*] are held before the queen's commissioners, among whom are usually two judges of the courts at Westminster, twice yearly in every county of the kingdom, except as hereinafter stated. We formerly observed (*b*), that, at the assizes, the judges sit by virtue of four several authorities: two of which, the commission of assize and its attendant jurisdiction of *nisi prius*, were then explained at large. According to the existing practice, a commission of association being issued, in lieu of the commission of *nisi prius*, and that of the peace. The third, which is the commission of the peace, was also treated of in a former volume (*c*), when we inquired into the nature and office of a justice of the peace. I shall only add, that all the justices of the peace of any county, wherein the assizes are held, are bound by law to attend them, or else are liable to a fine; in order to return recognizances, &c. and to assist the judges in such matters as lie within their knowledge and jurisdiction, and in which some of them have probably been concerned, by way of previous examination (*d*). * But the fourth authority is the com- [** 351*] mission of oyer and terminer, to hear and determine all treasons, felonies, and misdemeanors. This is directed to the circuit judges and usually also to some serjeants at law, queen's counsel, or barristers with patents of precedence (*e*), who attend the circuit. The words of the commission are, "to inquire, hear, and determine:" so that by virtue of this commission they can only proceed upon an indictment found at the same assizes; for they must first inquire by means of the grand jury or inquest, before they are empowered to hear and determine by the help of the petit jury. Therefore they have, besides, fifthly, a commission of general gaol delivery; which empowers them to try and deliver every prisoner, who shall be in the gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted, or for whatever crime committed. It was anciently the course to issue special writs of gaol delivery for each particular prisoner, which were called the writs *de*

(*u*) See *Reg. v. Clark*, 1 C. L. R. (C. C.) 54.

By s. 4 of the above act the case may be sent back to be amended.

(*z*) The jurisdiction given by the act is to be exercised by the common law judges, or five of them at least, of whom the chief justices of the Queen's Bench or Common Pleas, and the lord chief baron, or one of such chiefs at least, shall be part, being met in the exchequer chamber, or other convenient place. Sect. 3.

(*a*) As to which, see 4 Inst. 163, 168; 2 Hale, P. C. 22, 32; 2 Hawk. P. C. 14, 23.

(*b*) *Ante*, vol. iii.

(*c*) *Ante*, vol. i.

(*d*) We find one of the judges (*temp. Geo. I.*) complaining to the then chancellor of the apathy evinced by justices of the peace in regard to the discharging of this portion of their duty; he says, (15 St. Tr. 1421—2) "that there was grown up a sort of general

neglect all over England of the appearance of the justices of the peace at the assizes, when the judges had often matters to inform them of by the king's command," he complains that "trials of felons were often imperfect by the non-attendance of the committing justices," he argues that their attendance is a respect due to the king, upon so solemn an occasion, certainly no hardship upon them, inasmuch as three grounds of excuse will readily be admitted if stated to the court: 1. That the justice is not fit to travel through age or ill-health; 2. That he is living permanently, or, 3, is casually out of the county in which the assizes are being held, and adds, "if justices of the peace will remain at home about their private affairs, or to avoid the trouble of attending at the assizes, this ought to be looked on as a neglect of the duty of their office."

(*e*) 18 & 14 Vict. c. 25.

bono et malo (*f*): but these being found inconvenient and oppressive, a general commission for all the prisoners has long been established in their stead. So that, one way or other, the gaols are in general cleared, and all offenders tried, punished, or delivered, at least twice in every year: a constitution of singular use and excellence. We may observe also that winter assizes are held when expedient to clear the gaols in counties where crime may have been prevalent, as also to prevent the undue languishing in prison of accused persons, and the charge for their support, which would be thrown upon the county rates. And that sometimes, upon urgent occasions, a special or extraordinary commission of *oyer* and *terminer*, and gaol delivery, is issued by the [* 352] crown (*g*), confined to those offences which stand in need of *immediate inquiry and punishment: upon which the course of proceeding is much the same as upon general and ordinary commissions. Formerly it was held, in pursuance of the repealed (*h*) statutes 8 Ric. 2, c. 2, and 33 Hen. 8, c. 24, that no judge or other lawyer could act in the commission of *oyer* and *terminer*, or in that of gaol delivery, within his own county where he was born or inhabited; in like manner as they were prohibited from being judges of assize and determining civil causes. But that local partiality, which the jealousy of our ancestors was careful to prevent, being judged less likely to operate in the trial of crimes and misdemeanors, than in matters of property and disputes between party and party, it was thought proper, by the statute 12 Geo. 2, c. 27, to allow any man to be a justice of *oyer* and *terminer* and general gaol delivery within any county of England.

VII. Another important court of criminal jurisdiction is that established by the stat. 4 & 5 Will. 4, c. 36, and entitled the "Central Criminal Court."

VII. The Central Criminal Court. This court constituted as below mentioned (*i*) sits monthly (*k*) and has cognizance of all offences committed in London and Middlesex, and in certain specified portions of the adjacent counties of Essex, Kent, and Surrey (*l*). We have seen that an indictment for felony or misdemeanor committed out of the jurisdiction of the central criminal court and removed into queen's bench by *certiorari*, may by that latter court be ordered [* 353] to be tried there, and *that offences committed within the jurisdiction of the admiralty are also there triable. Persons moreover subject to the Mutiny Act may, under certain circumstances, be tried at the Central Criminal Court for the murder or manslaughter of any person subject to that act where the offence has been committed in England or Wales out of the jurisdiction of the court (*m*).

VII.* The court of quarter sessions of the peace (*n*) is a court that must be held in every county once in each quarter of the year. It is, by stat. 1 Will.

(*f*) 2 Inst. 48.

(*g*) As in the *Case of Frost and others* (1 Townsend's Mod. St. Tr. 1), who were tried before Tindal, C. J., acting under a special commission in the year 1840, or of the Chart-ist rioters, who were likewise tried under a special commission, A.D. 1842.

(*h*) See 26 & 27 Vict. c. 125.

(*i*) The judges of the court are the lord mayor of London, the lord chancellor, the judges of the superior courts of common law, the judge of the admiralty, the dean of

arches, the aldermen, recorder, common serjeant, and judge of the city of London Court, and such others as the crown may appoint.

Sect. 1.

(*k*) Sect. 15.

(*l*) Sect. 2.

(*m*) 25 & 26 Vict. c. 65.

(*n*) This court is styled the "General Sessions of the Peace," or when holden quarterly at the usual times, the "General Quarter Sessions of the Peace:" Arch. Quarter Sessions, 2nd ed. p. 2.

VII.* Court of 4, c. 70, s. 35, appointed to be held in the first week after the quarter sessions. 11th of October, the 28th of December, the 31st of March, and the 24th of June in every year; and by a subsequent act (4 & 5 Will. 4, c. 47), provision is made for preventing the April sessions from interfering with the Spring assizes.

This court is held before two or more justices of the peace, one of whom by the terms of the commission must be of the quorum (*o*); and for the dispatch of business the 59 Geo. 3, c. 28 (*p*), empowers the justices to divide the court, whenever the business seems likely to occupy more than three days, including the day of their assembling, and to select two or more justices, to sit apart.

The jurisdiction of the court of quarter sessions was formerly very wide, extending under the statute 34 Edw. 3, * c. 1, to the trying and determining of all felonies and trespasses whatsoever, except new offences [*354] created by statute, for which another mode of trial might be directed, and of all offences less than felony, with one or two exceptions of little practical importance, and resting on a principle not easily to be discovered (*q*).

But though the justices in quarter sessions assembled thus theoretically possessed an ample jurisdiction, in practice they seldom, if ever, tried any offences greater than small felonies within the benefit of clergy (*r*); their commission providing, that if any case of difficulty arises, they shall not proceed to judgment, but in the presence of one of the judges of assize. And therefore murders, and other capital felonies, were usually remitted for a more solemn trial to the assizes. Nor, as above intimated, could this court try any new-created offence, without express power given them by the statute which created it (*s*). And recently the jurisdiction of the court of quarter sessions (*t*) in criminal cases has been much limited: the statute 5 & 6 Vict. c. 38, having enacted that neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of a borough, shall, at any session of the peace or adjournment thereof, try any person for any treason, murder, or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable by transportation for life, or now by penal servitude (*u*); or for any of the following offences:—1, misprision of * treason; 2, offences against the queen's title, prerogative, person, [*355] or government, or against either house of parliament; 3, offences subject to the penalties of præmunire; 4, blasphemy, and offences against religion; 5, administering and taking unlawful oaths; 6, perjury and subornation of perjury; 7, making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor: 8, for-

As to this court in general, see 4 Inst. 170, Com. Dig. Justices of the Peace, D. 1; Bac. Abr. Court of Sessions; Burn's Just. tit. Sessions, Justice of the Peace; Dalt. J. L. 185; 2 Hale, P. C. 42, 53; Hawk. P. C. b. 2, c. 8. As to the Middlesex Sessions, see stat. 7 & 8 Vict. c. 71; 22 & 23 Vict. c. 4.

(*o*) But this is rendered immaterial by stat. 26 Geo. 2, c. 27; and see 4 Geo. 4, c. 27.

(*p*) See also the 5 & 6 Vict. c. 38, s. 4.

(*q*) Dickinson's Quarter Sessions (edit. by Talfour), pp. 55, 291.

(*r*) As to which, *post*.

(*s*) 4 Mod. 379; Salk. 406; Lord Raym. 1144.

(*t*) By stat. 4 & 5 Will. 4, c. 26, s. 17, the quarter sessions of the cities of London and Westminster, the liberty of the Tower, the borough of Southwark, and the counties of Middlesex, Essex, Kent and Surrey, are restrained from trying all the higher classes of felonies and misdemeanors, when committed within the limits of that act, and by s. 16, indictments found at the sessions of the peace may be removed by certiorari before the justices of oyer and terminer and gaol delivery.

(*u*) 20 & 21 Vict. c. 3, s. 6.

gery; 9, unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern; 10, bigamy, and offences against the laws relating to marriage; 11, abduction of women and girls; 12, endeavouring to conceal the birth of a child; 13, offences against the bankrupt laws; 14, composing, printing, or publishing blasphemous, seditious, or defamatory libels; 15, bribery; 16, unlawful combinations and conspiracies, except conspiracies or combinations to commit offences which such justices or recorder may have jurisdiction to try when committed by one person; 17, stealing, or fraudulently taking, injuring or destroying, records, or documents belonging to any court of law or equity, or relating to any proceeding therein; and 18, stealing or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate, or any interest in lands. Also, by the 24 & 25 Vict. c. 96, s. 87, no misdemeanor against any of the preceding twelve sections (x) of that act shall be prosecuted or tried at quarter sessions. And by the 9 Geo. 4, c. 69, s. 9, the offence of entering into or being in land by night armed, for the purpose of taking game (y), is cognisable only by the justices of gaol delivery of the county or place in which the offence is committed, and the justices in sessions have no jurisdiction over it.

[* 356] *Notwithstanding the restrictions which have been thus wisely imposed by the legislature on the judicial powers exercisable by justices at quarter sessions, there are still many ordinary offences and particular matters which belong properly to this jurisdiction, and ought to be prosecuted in this court (z). Some of these are proceeded upon by indictment; and others in a summary way by motion and order thereupon; which order may for the most part, unless guarded against by particular statutes, be removed into the court of queen's bench, by writ of *certiorari facias*, and be there either quashed or confirmed. The court of quarter sessions has also an appellate jurisdiction, which has been entirely conferred by statute, in relation to summary convictions and orders made by justices.

The records or rolls of the sessions are committed to the custody of a special officer denominated the *custos rotulorum*, who is always a justice of the peace; and among his fellow justices of especial consequence and standing (a). The nomination of the *custos rotulorum* (who is the principal civil officer in the county, as the lord lieutenant is the chief in military command) is by the queen's sign manual: and to him belongs the nomination of the clerk of the peace (b), who acts ministerially at quarter sessions and is removable for misconduct by the justices (c).

Even prior to the statute 5 & 6 Will. 4, c. 76, there were in most cities and towns corporate quarter sessions held before the mayor and justices for the trial of minor offences committed within the municipal boundaries; and, in performing their judicial duties, these magistrates were usually assisted by a

(x) See these sections, *ante*, pp. 303—7.

(y) *Ante*, p. 292.

(z) As to the jurisdiction of the quarter sessions in cases of bastardy, see now the 4 & 5 Will. 4, c. 76, ss. 72—75, and 2 & 3 Vict. c. 85.

(a) Lambard, *Eirenarcha*, bk. 4, c. 8.

(b) Stat. 37 Hen. 8, c. 1, s. 3; 1 W. & M. sess. 1, c. 21, s. 4.

(c) 1 Will. & M. sess. 1, c. 21, s. 6, extended by 27 & 28 Vict. c. 65, of which s. 3 gives a right of appeal to the lord chancellor.

barrister, who acted as assessor * to the mayor (*d*). But by the act just named (amended by the 6 & 7 Will. 4, c. 105, and 6 & 7 Vict. c. [* 357] 89), important alterations have been made in the constitution of borough courts of quarter sessions. The 103rd section of this act empowers the crown, on the petition of the council of any borough, setting forth the matters therein mentioned, to grant that a separate court of quarter sessions of the peace shall be thenceforward held therein presided over by a barrister of not less than five years' standing, as recorder, who is to be *ex officio* a justice of the peace for the said borough; and sect. 105 directs that such recorder shall hold, once in every quarter of a year at least, a court of quarter sessions of the peace for the borough; and enacts, that his court shall be a court of record, and shall have cognizance of all offences and matters cognizable by any court of quarter sessions of the peace for counties; except that the recorder may not make a county rate, nor grant alehouse licences, nor exercise any of the powers specially vested by the act in the council of the borough. A subsequent statute, 1 Vict. c. 78, s. 49, empowers the crown to grant a charter of incorporation to any town or borough not previously incorporated, and to extend to the inhabitants thereof all the powers and provisions of the 5 & 6 Will. 4, c. 76.

VIII. The court of the coroner (*e*) is a court of record, to inquire, when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. And this the coroner is only entitled to do
VIII Court of the coroner. *super visum corporis* (*f*). Of the coroner and his office we treated at large in a former volume (*g*), among the public officers * and [* 358] ministers of the kingdom; and therefore shall not here repeat our inquiries; only mentioning his court, by way of regularity, among the criminal courts of the nation.

Although the three courts next specified have ceased to be of practical importance, they may be thought to deserve notice in this list of our criminal tribunals.

IX. The sheriff's tourn (*h*), or rotation, was a court of record, held twice every year within a month after Easter and Michaelmas, before the sheriff, in different parts of the county; being indeed only the "turn" of
IX. Sheriff's tourn. the sheriff to keep a court leet in each respective hundred (*i*): this therefore was the great court-leet of the county, as the county court was the court-baron: for out of this, for the ease of the sheriff, was taken:—

(*d*) Dickinson's Quarter Sess. (edit. by Tal-
 ound), p. 4.

As to the petty sessions and stipendiary magistrates, *post*.

(*e*) 4 Inst. 271; 2 Hale, P. C. 53; 2 Hawk. P. C. 42.

(*f*) As to the power of the coroner to hold inquests where the cause of death arose out of his jurisdiction, and the proceedings in case of a verdict of murder or manslaughter found thereon, see stat. 6 & 7 Vict. c. 12.

(*g*) *Ante*, vol. i.

(*h*) 4 Inst. 259; 2 Hale, P. C. 69; 2 Hawk. P. C. 55.

(*i*) Mirr. c. 1, s. 13, 16. In *Colebrooks v. Elliott*, 8 Burr. 1860, Ld. Mansfield says: "The tourn and the leet derived out of it were anciently the principal courts of criminal jurisdiction; coeval with the establishment of the Saxons here. There were no traces of them, either amongst the Romans or Britons, but the activity of those courts is marked very visibly both amongst the Saxons and the Danes."

X. The court-leet, or view of frankpledge (*k*), being a court of record, held once in the year and not oftener (*l*), within a particular hundred, lordship, or manor before the steward of the leet: a court granted by charter from the crown to the lord of such hundred or manor. Its original intent was to view the frank pledges, that is, the freemen within the liberty; who, according to the institution of the Anglo-Saxons, were all mutually pledges for the good behaviour of each other. Besides this, the preservation of the peace, and the chastisement of divers minute offences against the public good, were the objects both of the court-leet and the [* 359] sheriff's tourn; which had exactly the same * jurisdiction, one being only a larger species of the other, extending over more territory, but not over more causes. All freeholders within the precincts, and all persons commorant therein, with certain exceptions, were obliged to attend them, to appear upon the jury, if required, and to make their due presentments. It was also anciently the custom to summon all the king's subjects, as they respectively grew to years of discretion and strength, to come to the court-leet, and there take the oath of allegiance to the king. The other general business of the leet and tourn, was to present by jury all crimes whatsoever that happened within their jurisdiction; and not only to present, but also to punish, trivial misdemeanors, as trivial debts were recoverable in the court baron, and county court: justice, in these minuter matters of both kinds, being brought home to the doors of every man by our ancient constitution. Thus in the Gothic constitution, the *hæreda*, which answered to our court-leet, "*de omnibus quidem cognoscit, non tamen de omnibus judicat*" (*m*). The objects of their jurisdiction were therefore unavoidably very numerous: being such as in some degree, either less or more, affected the public weal, or good governance of the district in which they arose; from common nuisances and other material offences against the king's peace and public trade, down to eaves-dropping, waifs, and irregularities in public common. But both the tourn and the leet have been for a long time in a declining way: a circumstance, owing in part to the discharge granted by the statute of Marlbridge, 52 Hen. 3, c. 10, to all prelates, peers, and clergymen, from their attendance upon these courts; which occasioned them to grow into disrepute. And hence it is that their business has for the most part gradually devolved upon the quarter sessions; which it is particularly directed to do in some cases by statute 1 Edw. 4, c. 2.

[* 360] * XI. The court of the clerk of the market (*n*) was formerly incident to every fair and market in the kingdom, to punish misdemeanors therein; as a court of *pie poudre* was to determine all disputes relating to private or civil property. The object of this jurisdiction (*o*) was principally the cognizance of weights and measures, to try whether they were according to the true standard thereof, or no: a matter which, as formerly mentioned (*p*), is now within the province of other officers.

XI. Court of clerk of the market.

(*k*) 4 Inst. 261; 2 Hawk. P. C. 72.

(*l*) Mirror, c. 1, s. 10.

(*m*) Stiernh. de Jur. Goth. l. 1, c. 2.

(*n*) 4 Inst. 273.

(*o*) See stat. 17 Car. 2, c. 19; 23 Car. 2, c. 8; 23 Car. 2, c. 12.

(*p*) *Ante*, vol. i.

Other criminal courts (*q*) of greater dignity than some * of those already noticed, but of a more confined and partial jurisdiction, formerly existed in this country, which now possess merely historic interest; reference may however properly be made to—

XII., the courts of the universities of Oxford and Cambridge, which exercise a certain criminal jurisdiction in regard respectively to their own members, and of which each is, in the absence of the vice-chancellor, presided over by an assessor learned in the law (*r*).

Courts for administering criminal justice are, in accordance with our law, public and open courts (*s*),—this rule * being subject to some few qualifications which on grounds of decency or expediency have been admitted. Judges, for example, when holding the assizes, have a discretionary power to order that women

(*q*) Of which may be mentioned:—

1. The court of chivalry, which was a military court, or court of honour, when held before the earl marshal only, was also a criminal court, when held before the lord high constable of England jointly with the earl marshal. And then it had jurisdiction over pleas of life and member, arising in matters of arms and deeds of war, as well out of the realm as within it. But the criminal, as well as civil part of its authority, is fallen into entire disuse: there having been no permanent high constable of England (but only *pro hinc inde* at coronations and the like) since the attainder and execution of Stafford, Duke of Buckingham, in the thirteenth year of Henry VIII.; the authority and charge, both in war and peace, being deemed too ample for a subject: so ample, that when the chief justice Fineux was asked by King Henry VIII., how far they extended, he declined answering; and said, the decision of that question belonged to the law of arms, and not to the law of England. (4 Inst. 123; 2 Hawk. P. C. 9. Duck de Authorit. Jur. Civ.)

2. The court of the lord steward, treasurer, or comptroller of the king's household, was instituted by statute 3 Hen. 7, c. 14, to inquire of felony by any of the king's sworn servants, in the cheque roll of the household, under the degree of a lord, in confederating, compassing, conspiring, and imagining the death or destruction of the king, or any lord or other of his majesty's privy council, or the lord steward, treasurer, or comptroller of the king's house. The inquiry, and trial thereupon, was by a jury according to the course of the common law, consisting of twelve sad men (that is, sober and discreet persons) of the king's household. 4 Inst. 133. The stat. 3 Hen. 7, c. 14, was repealed by the 9 Geo. 4, c. 81, and the jurisdiction of this court has accordingly become obsolete.

3. The court of the lord steward of the king's household, or (in his absence) of the treasurer, comptroller, and steward of the marshalsea, were erected by stat. 33 Hen. 8,

c. 12, with a jurisdiction to inquire of, hear, and determine, all treasons, misprisions of treason, murders, manslaughters, bloodshed, and other malicious striking; whereby blood might be shed in, or within the limits (that is, within two hundred feet from the gate) of any of the palaces and houses of the king, or any other house where the royal person should abide. The proceedings in this court also were by jury, both a grand and a petit one, as at common law, taken out of the officers and sworn servants of the king's household. The form and solemnity of the process, particularly with regard to the execution of the sentence for cutting off the hand, which was part of the punishment for shedding blood in the king's court, are minutely set forth in the said statute of 33 Hen. 8, and the several offices of the servants of the household in and about such execution are described: from the serjeant of the wood-yard, who furnished the chopping-block, to the serjeant farrier, who brought hot irons to sear the stump. (4 Inst. 133; 2 Hale, P. C. 7.) The statute of 33 Hen. 8 was, so far as concerns the punishment specified, repealed by the 9 Geo. 4, c. 81, and the jurisdiction of the court last mentioned has fallen into desuetude.

(*r*) The Chancellor's Court of the University of Oxford is now regulated under the provisions of the stats. 17 & 18 Vict. c. 45; 25 & 26 Vict. c. 26, s. 12.

As to the criminal jurisdiction of the Vice-Chancellor of Cambridge, see *Kemp v. Neville*, 10 C. B. N. S. 523.

(*s*) Sir John Hawles (S. G. temp. Will. III.) in his remarks upon the trial of Cornish (11 St. Tr. 455, 460), says the reason why "all matters of law are or ought to be transacted publicly" is that any person may as *amicus curiæ* inform the court concerning the matter to be tried, in order that justice may be done and truth may be discovered. Hence, he adds, there is an invitation given to all persons who can give such information to come forward and they shall be heard.

and children shall leave the court pending the investigation of certain cases; or that persons who have been subpoenaed as witnesses shall, until summoned or called for, absent themselves from court to prevent collusive evidence being given and perjury perhaps being committed.

The question whether the court of the coroner is to be regarded as an open and public court, has been solemnly discussed, and it has been judicially observed (*t*) that the inquiry concerning the death of a person "ought for the purposes of justice in some cases to be conducted in secrecy; it is a preliminary inquiry which may or may not end in the accusation of a particular individual. It may be requisite that a suspected person should not in so early a stage be informed of the suspicion that may be entertained against him, and of the evidence on which it is founded, lest he should elude justice by flight, by tampering with witnesses, or otherwise." Who, then, is to decide whether privacy be necessary or proper? The coroner alone; and even in cases where absolute privacy may not be required, the exclusion from the room in which the inquest is held of particular persons, may be necessary or proper (*u*).

In answering the question, however, whether a particular court is to be deemed a public and open court, not only general considerations of expediency, but express enactments may have to be noticed; for instance, the legislature has thought fit to require publicity where a justice is engaged in an investigation with a view to summary conviction (*x*), but not so where the investigation [* 363] is preliminary merely to commitment. For by the 11 * & 12 Vict. c. 43, s. 12 (an act to facilitate the performance of the duties of justices of the peace out of sessions with respect to summary convictions and orders), it is enacted as follows:—That the room or place in which the justice shall sit to hear any such complaint or information as in that statute specified "shall be deemed an open and public court to which the public generally may have access, so far as the same can conveniently contain them;" and under the 18 and 19 Vict. c. 126, every petty sessions for the purposes of that act shall be an open public court (*y*). On the other hand, by the 11 & 12 Vict. c. 42, s. 19, it is enacted that the room or building in which the examination of witnesses is taken preliminary to the commitment of an accused person under the provisions of that statute, "shall not be deemed an open court for that purpose, and it shall be lawful for the justice in his discretion" to order that no person shall have access to, or be, or remain in such room or building without the consent or permission of the justice, "if it appear to him that the ends of justice will be best answered by so doing." The legislature thus enacting have done so conformably to the above views judicially expressed, for in preliminary investigations as to the commission of crime publicity may often defeat the very end in view; although where investigation is to be immediately followed by adjudication, the court in which such inquiry is conducted ought clearly to be an open and a public court. (725)

(*t*) *Per* Lord Tenterden, C. J., *Garnett v. Ferrand*, 6 B. & C. 611.

(*u*) *Judgm.* 6 B. & C. 626—8.

(*x*) *Post*, chap. xvii.

(*y*) Sect. 9.

(725) In the United States, when the offense is against the general government, the Constitution provides that the trial shall be "public." U. S. Const. Amend., art. 6. And there is a similar provision in the Constitutions of several of the States, as to crimes against the State

Before concluding this chapter, may properly be noticed the method, immemorially used by the superior courts of justice, and generally by courts of record, of punishing contempts by attachment, and the subsequent proceedings thereon.

The contempts thus punished are either direct, which * openly [* 364] insult or resist the powers of the court, or the persons of the judges who preside there; or else are consequential, which (without such gross insolence or direct opposition) plainly tend to create an universal disregard of their authority. The principal instances, of either sort, usually punished by attachment (z), are as follow:—1. Those committed by inferior judges and magistrates: by acting unjustly, oppressively, or irregularly, in administering such portions of justice as are intrusted to their distribution; or by disobeying the queen's writs issuing out of the superior courts, by proceeding in a cause after it is put a stop to or removed by writ of prohibition, *certiorari*, error, *superse-deas*, and the like. For, as the superior courts (and especially the court of queen's bench) have a general superintendence over all inferior jurisdictions, any corrupt or iniquitous practices of subordinate judges are contempts of that superintending authority, whose duty it is to keep them within the bounds of justice. 2. Those committed by sheriffs, bailiffs, gaolers, and other officers of the court: by abusing the process of the law, or deceiving the parties, by acts of oppression, extortion, or collusive behaviour, or by culpable neglect of duty. 3. Those committed by counsel (a) or by attorneys and solicitors, who are officers of the respective courts: involving fraud and corruption, injustice to their clients, or other dishonest practice. For the malpractice of the officers reflects some dishonour on their employers; and, if frequent or unpunished, might create among the people a disgust against the courts themselves. 4. Those committed by jurymen, in collateral matters relating to the discharge of their office: such as making default when summoned; refusing to be sworn, or to give any verdict; eating or drinking without the leave of the court, and especially at the cost of either party; and other misbehaviours or irregularities of a like kind: but not in the * mere exercise of their judicial capaci- [* 365] ties, as by giving a false or erroneous verdict (b). 5. Those committed by witnesses, by making default when summoned, refusing to be sworn, or on examination to answer a proper question (c), or prevaricating in their evidence when sworn. 6. Those committed by parties to any suit or proceeding before the court: as by disobedience to a rule or order, made in the progress of a cause; by non-payment of costs awarded by the court upon motion; or by non-observance of the award of an arbitrator or umpire, the submission having been made a rule of court (d). Indeed the attachment for a contempt of this species, and especially for non-payment of costs or non-performance of an award, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for contempt of the authority of the court. And therefore it has been held that such a contempt, and the process thereon, being properly the civil remedy of an individual for a private injury is not released or affected by a general act of pardon. And upon a similar principle, obedience to a rule of court may by

(z) 2 Hawk. P. C. bk. ii. ch. 22.

(a) *Ex parte Pater*, 5 B. & S. 299.

(b) See *Bushell's Case*, and Note thereto, Broom's Constitut. L. pp. 120, 144.

(c) *Reg. v. Charlesworth*, 2 F. & F. 332—334.

(d) See Russell on Arbitr. 8rd ed., chap. 6.

statute 10 Geo. 3, c. 50, s. 5, be enforced against any person having privilege of parliament by the process of distress infinite. 7. Those committed by any persons, including peers, when accompanied with violence, such as forcible rescue and the like (*e*); or when they import a disobedience to the great prerogative writs, of prohibition, *habeas corpus* (*f*), and the rest. Some of these contempts may arise in the face of the court; as by rude and contumelious behaviour; by obstinacy, perverseness, or prevarication; by breach of the [* 366] peace, or any wilful * disturbance whatever (*g*): others in the absence of the party; as by disobeying or treating with disrespect the queen's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the judges, acting in their judicial capacity; by printing a false account (or even a true one in disobedience to an order of the court (*h*)) of a cause there depending; and by any thing, in short, demonstrating a gross want of that regard and respect, which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.

The process of attachment, for these and the like contempts, must necessarily be as ancient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power therefore in the supreme courts of justice to suppress any such contempt, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly we find it actually exercised as early as the annals of our law extend. And though a very learned author (*i*) seems inclined to derive this process from the statute of Westm. 2, 13 Edw. 1, c. 39, (which ordains, that in case the process of the king's courts be resisted by the power of any great man, the sheriff shall chastise the resisters by imprisonment, "*a quod non deliberentur sine speciali præcepto domini regis.*" and if the sheriff himself be resisted, he shall certify to the courts the names of the principal offenders, their aiders, consenters, commanders, and favourers, and by a special writ judicial they shall be attached by their bodies to appear before the court, and if they be convicted * thereof they shall be punished at the king's pleasure, [* 367] without any interfering by any other person whatsoever), yet he afterwards more justly concludes, that it is a part of the law of the land; and, as such, is confirmed by the statute of *magna carta*.

If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judge (*j*), without any further proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him (*k*); or, in very flagrant instances of contempt, the

(*e*) Styl. 277; 2 Hawk. P. C. 152; Cro. Jac. 419; Salk. 586.

(*f*) 4 Burr. 682; Lords' Journ. 7 Feb., 8 June, 1757.

(*g*) *Ante*, p. 160.

(*h*) *R. v. Clement*, 4 B. & Ald. 218.

(*i*) Gilb. Hist. C. P. ch. 8.

(*j*) Staund. P. C. 73, b.

(*k*) Styl. 277. See Reg. Pr. Hil. T. 1853, r 168.

attachment issues in the first instance (*l*); as it also does, if no sufficient cause be shown to discharge, and thereupon the court confirms and makes absolute the original rule. This process of attachment is merely intended to bring the party into court: and, when there, he must either stand committed, or put in bail, in order to answer upon oath to such interrogatories as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the court be exhibited within the first four days (*m*): though if any interrogatory be improper, the defendant may refuse to answer it, and move the court to have it struck out (*n*). If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury (*o*). If he confesses the contempt, the court will proceed to correct him by * fine, or imprisonment, or both (*p*); and if he wilfully and obstinately refuses to answer, or answers in an eva- [* 368] sive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court.

It cannot have escaped the attention of the reader, that this method of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law; and seems to have been derived to our courts of law through the medium of courts of equity. For the whole process of a court of equity, in the several stages of a cause, and finally to enforce its decrees, was, till the introduction of sequestrations, in the nature of a process of contempt; acting only *in personam* and not *in rem*. There, however, after the party in contempt has answered the interrogatories, such his answer may be contradicted and disproved by affidavits of the adverse party: whereas, in a court of law, the admission of the party to purge himself by oath is more favourable to his liberty, though perhaps not less dangerous to his conscience: for, if he clears himself by his answers, the complaint is totally dismissed. And, with regard to this singular mode of trial, thus admitted in one particular instance, I shall only for the present observe, that as the process by attachment in general appears to be extremely ancient (*q*), and has in more modern times been recognised by parliament (*r*), so the method of examining the delinquent himself upon oath with regard to the contempt alleged, is at least of as high antiquity (*s*), and by long and immemorial usage has become the law of the land. (726)

(*l*) Salk. 84; Stra. 185, 564.

(*m*) *Saunders v. Melhuish*, 6 Mod. 78.

(*n*) Stra. 444.

(*o*) *Saunders v. Melhuish*, 6 Mod. 78.

(*p*) Cro. Car. 146. See *R. v. Elkins*, 4 Burr. 2129.

(*q*) Yearb. 20 Hen. 6, c. 37; 23 Edw. 4, c. 29.

(*r*) Stat. 43 Eliz. c. 6, s. 2; 18 Car. 2, st. 2, c. 2, s. 4; 9 & 10 Will. 3, c. 15.

(*s*) M. 5 Edw. 4, rot. 75, cited in Rast. Ent.

268, pl. 5.

(726) See *ante*, 435, note 669.

[* 369]

*CHAPTER XVII.

SUMMARY PROCEEDINGS AND CONVICTIONS.

WE are next, in carrying out our plan, to take into consideration the proceedings in criminal courts for the punishment of offenders, and shall here accordingly speak of proceedings with a view to summary conviction, and afterwards of those which result in the verdict of a jury and judgment thereupon. In summary proceedings there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only, as the law has appointed for his judge.

I. Of this summary nature are trials of all such offences and frauds against the laws of the excise (*a*), and other branches of the revenue, as may be inquired into and determined by the commissioners of those
I. Frauds against revenue laws. respective departments, or by justices of the peace.

II. Another branch of summary proceedings is that before justices of the peace who, out of their general sessions, have, for the public convenience, been entrusted with the hearing and determining of many matters, criminal or quasi-criminal, in their nature. The practice long since (*b*) adopted by the legislature of granting to justices thus acting a power of summary conviction has greatly *prevailed in modern times, and
 [* 370] caused much innovation on the mode of procedure in criminal cases, viz., trial by jury, known to our customary law.

The summary jurisdiction exercised by justices out of sessions being essentially the creature of statute (*c*), it follows that whenever a question arises as to the existence of such a jurisdiction, or as to the mode in which it should be exercised, reference must be made to the particular act of parliament, by virtue of which it is assumed, nor must the words there found be strained or extended so as to give jurisdiction beyond their ordinary and natural signification (*d*).

The magisterial powers referred to are exercised at petty sessions (*e*) or by two justices sitting together, which, in fact, constitutes a petty session, or by one justice, the rule being that an authority given by statute to two justices cannot be executed by one, but that an authority so given to one justice may be executed by a greater number. The magistrates at the metropolitan police courts and the lord mayor or an alderman of the city of London, as well as the stipendiary magistrates (*f*), having in most cases power within the limits of their respective jurisdictions to do alone whatever is authorised to be done by one or more justices (*g*).

(*a*) See Bateman's Excise Officer's Manual, 3rd ed., p. 493, *et seq.*

(*b*) When this practice was first adopted it is not easy on account of the ambiguous wording of some of the older statutes to determine. Paley on Conv., 5th ed., p. 5, *et seq.*, where the subject is discussed.

(*c*) Paley Conv., 5th ed., p. 16.

(*d*) One reason for this being that all pow-

ers which may be exercised in restraint of liberty should be strictly pursued. *Bracy's Case*, 1 Salk. 348.

(*e*) See stats. 9 Geo. 4, c. 43; 6 Will. 4, c. 12; 12 & 13 Vict. 6. 18.

(*f*) See stat. 26 & 27 Vict. c. 97.

(*g*) 11 & 12 Vict. c. 43; ss. 33 & 34; 21 & 22 Vict. c. 73; 2 & 3 Vict. c. 71, s. 14; 3 & 4 Vict. c. 84.

Summary proceedings before a justice of the peace, which are now for the most part regulated by the statute 11 & 12 Vict. c. 43 (*h*) commence with the laying of an information, or making a complaint, forming respectively *the groundwork of a conviction, or an order (*i*), which need not be substantiated by oath or affirmation unless some particular statute [*371] otherwise require, or unless where in the case of an information a warrant to apprehend the defendant is in the first instance to be issued by the justice as hereinafter mentioned (*k*). No objection can be taken to the complaint or information for want of form (*l*). Nor as regards an information does the statute of 11 & 12 Vict. require that it shall be in writing, though the practice is so to lay it. It is moreover expressly enacted that the complaint upon which to found an order for the payment of money or otherwise need not be in writing, unless required to be so by the particular act of parliament upon which such complaint is framed (*m*). The complaint must, however, be for one matter and the information must be for one offence only, and every complaint or information may be made or laid by the complainant or informant in person, or by his counsel or attorney or any other person authorised by him (*n*).

If no time be specially limited by statute for making the complaint or laying the information, such complaint must be made and such information laid within six calendar months from the time when the matter thereof respectively arose (*o*).

*The complaint having been duly made or the information laid [*372] before the justice, he will issue a summons stating shortly the matter of such information or complaint, and requiring the attendance before him of the person named therein as defendant, and this summons will be served (*p*) upon the defendant by a constable, and if not obeyed may be followed up and enforced by warrant (*q*); or upon oath or affirmation of due service of the summons the justice may proceed *ex parte* to hear the information or complaint, and to adjudicate thereon (*r*).

Further, where an information has been laid for an offence punishable on conviction, the justice before whom it is laid may, if he think fit, upon oath or affirmation being made before him substantiating the matter of such information, instead of issuing a summons, issue in the first instance his warrant for

As to the jurisdiction of borough justices, see 5 & 6 Will. 4, c. 76.

(*h*) This act does not however extend (*inter alia*) to any warrant or order for the removal of a poor person chargeable to a parish; nor to any complaints or orders made with respect to lunatics, or the expenses incurred for their maintenance; nor to proceedings under any of the statutes relating to the excise, customs, stamps, taxes, or post-office; nor to complaints, orders, or warrants in matters of bastardy made against the putative father of a bastard child; except such provisions as relate to the backing of warrants for compelling the appearance of such putative father, or warrants of distress, or to the levying of sums ordered to be paid, or to the imprisonment of a defendant for non-payment of the same; nor to proceedings

under acts relating to the labour of children and young persons in mills or factories. Sect. 35.

(*i*) *Post*, p. 875.

(*k*) Sect. 10.

(*l*) Sect. 1.

As to the mode of describing the ownership of property therein, see sect. 4.

(*m*) Sect. 8.

(*n*) Sect. 10.

(*o*) Sect. 11.

(*p*) Either personally or by leaving it with some one for the defendant at his last or most usual place of abode. Sect. 1.

(*q*) Sects. 1, 2.

No summons, however, need be issued in any case where the application for an order is to be made *ex parte*. Sect. 1.

(*r*) Sect. 2.

apprehending the defendant and bringing him up to answer to the information, and to be dealt with according to law (*s*).

The attendance of witnesses at the hearing is enforceable by summons and warrant thereupon, or if such justice is satisfied by evidence upon oath or affirmation, that a person whose testimony is needed will probably not attend to give evidence without being compelled to do so, he may issue his warrant in the first instance against such witness (*t*).

The hearing of the complaint or information is before one or two justices (*u*) [**373*] as required by the act upon which *it has been framed, and if there be no such requirement in the act it may be heard by a single justice, the complainant or informant being entitled to conduct his case by counsel or attorney, and the defendant likewise being entitled to make his defence thereto, and to have the witnesses produced, examined and cross-examined by counsel or attorney on his behalf (*x*).

The procedure in case of non-appearance of either party at the hearing has been thus specially regulated:—

1. If at the time and place appointed for the hearing, the defendant do not appear, the justice may, on proof of service of the summons, proceed to hear and determine the case in the defendant's absence, or if he think fit may issue a warrant for his apprehension, and adjourn the hearing until it has been executed, and the defendant when apprehended under such warrant may be committed to prison, and ordered to be brought up before the justice at a certain time and place, of which the complainant or informant is to have due notice (*y*).

2. If, at the time and place appointed for the hearing, the defendant attend, but the complainant or informant do not appear, the justice may dismiss the complaint or information, unless for some reason he think proper upon terms to adjourn the hearing to another day, in which latter case the defendant may, in the interim, be committed to prison, or may be discharged on entering into recognizances for his re-appearance (*y*).

[**374*] 3. If both parties are present at the hearing, the *substance of the information or complaint is to be stated to the defendant, who will then be asked if he have any cause to show why he should not be convicted, or why an order should not be made against him, as the case may be, and if he thereupon admit the truth of the information or complaint, and show no cause or no sufficient cause why he should not be convicted, or why an order should not be made against him, the justice will summarily convict him, or make an order against him according to the nature of the case (*z*).

(*s*) *Id.*

(*t*) Sect. 7.

(*u*) It must be observed that in any case such as above mentioned one justice may receive the information or complaint, may grant a summons or warrant thereon, may issue his summons or warrant to compel the attendance of a witness, and do all other necessary acts and matters preliminary to the hearing, even in cases where by statute such information or complaint must be heard and determined by two or more justices; and after the case has been so heard and determined one justice may issue a warrant of distress or commitment thereon. Further it is not nec-

essary that the justice who so acts before or after the hearing should be the justice or one of the justices by whom the case was heard and determined. But where by statute it is required that any information or complaint shall be heard and determined by two or more justices, or that a conviction or order shall be made by two or more justices, such justices must be present and acting together during the whole of the hearing and determination of the case. Sect. 29.

(*x*) Sect. 12.

(*y*) Sect. 13.

(*z*) Sect. 14.

Should the defendant not admit the truth of the charge preferred against him, the justice will proceed to hear the prosecutor or complainant, and such witnesses as he may examine, and such other evidence as he may adduce, in support of his information or complaint (*a*); the prosecutor of an information, whether or not having any pecuniary interest in the result of the same (*b*), and the complainant, where a complaint has been made, whatever his interest may be in the result thereof, being a competent witness in support of it, and every witness being examined upon oath or affirmation (*c*). And should any witness summoned to attend the hearing, or brought by warrant before the justice, refuse to be examined, or to take the requisite oath or affirmation, or, having taken it, to answer questions put to him, without offering any just excuse for his refusal, he may be committed for any time not exceeding seven days, unless he, in the meantime, consent to be examined (*d*).

It will be for the prosecutor or complainant to establish his case by competent testimony, though if the information or complaint negative any exemption, exception, proviso, or condition in the statute on which it may be framed, it will not be necessary for him to prove such negative, but it will be for the defendant to prove the * affirmative thereof in his defence, if he [* 375] would have advantage of the same (*e*). Further, should a variance appear between the information and the evidence adduced in support of it, and the justice be of opinion that the defendant has been deceived thereby, the hearing of the case may be adjourned, upon terms, to some future day, and in the meantime the defendant may be committed, or may be discharged upon recognizance duly given for his re-appearance (*f*).

The evidence on behalf of the prosecutor or complainant having been given, the justice will proceed to hear the defendant and such witnesses as he may examine and evidence (*g*) as he may adduce in his defence, he will also hear such witnesses as the prosecutor or complainant may examine in reply, where the defendant has examined witnesses or given evidence other than as to his general character; but the prosecutor or complainant will not be entitled to make observations in reply upon the evidence given by the defendant, nor will the defendant be entitled to observe upon the evidence, if any, given by the prosecutor or complainant in reply; it will be for the justice (*h*), having heard each party, his witnesses and evidence, and having considered the whole matter, to convict or make an order upon the defendant, or to dismiss the information or complaint, making in this latter case, if he think fit, when required so to do, an order of dismissal, and giving the defendant a certificate thereof, which will, without * further proof, be a bar to any subsequent information or complaint for the same matter against the same party (*i*). [* 376] Upon summary conviction or order, the justice may also in his discretion

(*a*) Sect. 13, *ad finem*. S. 14.

(*b*) 14 & 15 Vict. c. 99, s. 2.

(*c*) Sect. 15.

(*d*) Sect. 7.

(*e*) Sect. 14.

(*f*) Sect. 9, and see s. 1.

(*g*) Which will in general be directed either to the merits of the case or to ousting the jurisdiction of the justice by setting up a claim of title. Paley on Conv., 5th ed., pp. 187—145.

As to impeaching the credit of a witness,

and the mode of proving an instrument or handwriting, see 28 & 29 Vict. c. 18, ss. 3—8, cited *post*, c. 19.

(*h*) Who is moreover empowered to adjourn the hearing, and in the meantime to commit the defendant or suffer him to go at large or discharge him upon recognizances, s. 16. And if at the time appointed for the adjourned hearing, the prosecutor or complainant do not appear, the justice may dismiss the information or complaint, with or without costs. *Id.*

(*i*) Sect. 14.

award costs against the defendant, and if the information or complaint be dismissed, costs may be awarded as against the prosecutor or complainant, such costs to be recoverable by distress (*k*).

A conviction or order for the payment of money when made is enforceable by commitment or by distress, to be followed if ineffectual by commitment.

1. In every case where the statute, by virtue of which a conviction for a penalty or compensation, or an order for the payment of money is made, makes no provision for such penalty, or compensation, or sum being levied by distress, but directs that if the same be not paid forthwith, or within a certain time therein mentioned, or to be mentioned in such conviction or order, the defendant shall be imprisoned, such penalty, compensation, or sum shall not be levied by distress; but if the defendant do not pay the same, together with costs, if awarded, forthwith, or at the time specified in such conviction or order for the payment of the same, he will be committed (*l*). Also, under the 28 & 29 Vict. c. 127, s. 4, where, upon summary conviction, a penalty not exceeding 5*l*. may be imposed, the justice is empowered, in case of non-payment, to commit the defendant without first issuing a distress warrant against him for a term, the limit of which is prescribed by the statute cited.

2. By the 11 & 12 Vict. c. 43, where a conviction adjudges a pecuniary penalty or compensation to be paid, or where an order requires the payment of a sum of money, and by the statute authorising such conviction or order, such penalty, compensation, or sum of money is to be levied upon the goods and chattels of the defendant by distress and sale thereof, and also in cases where [** 377*] by *statute no mode of raising or levying such penalty, compensation, or sum of money, or of enforcing the payment of the same, is specially provided for, a distress warrant, under the hand and seal of the justice, may be issued; should it, however, appear to the justice that the issuing of such a warrant would be ruinous to the defendant, or that there are no goods whereon to levy, the defendant may be committed (*m*). After issuing the distress warrant the defendant will be suffered to go at large, or will be ordered into custody until return be made to the warrant, unless he gives security by recognizance for his appearance at the return day (*n*). And in default of sufficiency of distress the justice may, on the return of the distress warrant, commit the defendant to prison (*o*). Moreover, in all cases of penalties, convictions, or orders, where the particular statute upon which the information or complaint was framed, provides no remedy in default of distress, the defendant may, upon such default appearing, likewise be committed (*p*).

Where, however, a conviction does not order the payment of a penalty, but that the defendant be imprisoned for his offence, or where an order is not for the payment of money, but for the doing of some other act, and directs that in case of the defendant's neglect or refusal to do such act, he shall be imprisoned; if the defendant should neglect or refuse to do the act so ordered to be done, the justice may commit the defendant (*q*), or if the defendant be then in prison upon a conviction for any other offence, the justice may order that

(*k*) Sects. 18, 24, 26, *et vide post*.

(*l*) Sect. 23.

(*m*) Sect. 19.

(*n*) Sect. 20.

(*o*) Sect. 21.

(*p*) Sect. 22.

(*q*) Sect. 24.

the imprisonment for such subsequent offence shall commence at the expiration of that to which the defendant had been previously sentenced (*r*).

On payment of the amount for which a distress warrant has been issued, or for which the defendant has been *committed to prison, the execution will be withdrawn or the defendant will be discharged from [*378] custody (*s*).

To many statutory provisions conferring summary powers of conviction upon justices of the peace, reference has heretofore been made, of which may be particularised those sections of the Criminal Law Consolidation and Amendment Acts, which empower them thus summarily to deal with assaults (*t*), petty larcenies (*u*), and malicious injuries to property (*x*). Reference has also been made to the jurisdiction of magistrates over a class of comparatively trivial offences such as drunkenness, vagrancy, and the like, which were formerly within the cognizance of the Court leet (*y*). To what has been before said upon this subject we may add that any person aiding, abetting, counselling or procuring the commission of an offence punishable on summary conviction, may be proceeded against and convicted for the same, either with the principal offender, or before or after his conviction, and is liable on conviction to the same forfeiture and punishment as the principal offender (*z*).

But although, as shown in the preceding pages, it has been found inexpedient if not altogether impossible to resort to a jury for the trial of every petty delinquent, and although it is especially desirable that speedy justice should, in cases such as have been adverted to, be done, various modes of setting right magisterial errors have been afforded, viz., 1. by appeal to the quarter sessions; 2. by *certiorari*; or, 3. by stating a special case—with a view to obtaining the judgment of a higher tribunal; and, 4. where the commitment is faulty or illegal, by *habeas corpus*.

1. An appeal against a summary conviction or order (*a*), * which is usually to the quarter-sessions, lies only in virtue of express enactment (*b*), and where given the justice is by some statutes required to make known to the defendant the right to appeal which he possesses (*c*). At the hearing of the appeal the magistrates are bound to receive fresh evidence, although not tendered before the convicting justice (*d*).

The practice in regard to appeals is now mainly regulated by the 12 & 13 Vict. c. 45, of which the 11th section enacts that at any time after notice given of appeal to sessions the parties may, by consent and order of a judge of one of the superior courts, state the facts in the form of a special case for the opinion of such court, by whose judgment the parties will be bound.

2. The defendant has in general a right to remove the conviction into the

(*r*) Sect. 25.

(*s*) Sect. 28.

(*t*) *Ante*, pp. 247—9.

(*u*) *Ante*, pp. 295—6.

(*x*) *Ante*, p. 819 (*e*).

(*y*) *Ante*, pp. 204—7. See, also, 81 & 82 Vict. c. 52.

(*z*) 11 & 12 Vict. c. 43, s. 5.

(*a*) If the defendant be convicted or an order be made against him, a minute or memorandum thereof is to be made for which no fee is payable, and the conviction or order

must afterwards be drawn up in proper form, and lodged with the clerk of the peace to be by him filed among the records of the general quarter sessions. 11 & 12 Vict. c. 43, s. 14.

(*b*) *R. v. Skone*, 6 East, 514.

(*c*) See *R. v. Justices of West Riding*, 8 M. & S. 498.

(*d*) *R. v. Commissioners of Excise*, 8 M. & S. 133.

As to recovering the costs of the appeal, see 11 & 12 Vict. c. 43, s. 27.

court of queen's bench by *certiorari*, which, being a beneficial writ for the subject, cannot be taken away without express words (e), the rule being that "although a *certiorari* lies unless expressly taken away, yet an appeal does not lie unless expressly given by statute" (f).

Upon a *certiorari* the conviction of the magistrate is removed into the superior court, but there is not (as upon an appeal) any re-hearing of the evidence or merits; the court looking only to the form of the conviction, and [* 380] gathering from that whether or not the party has been * legally convicted, the *certiorari* therefore operates in the nature of a writ of error, and no extrinsic objection to the proceedings can be taken (g). But a criminal information may be obtained against the magistrate for a false return (h).

3. Under the statute 20 & 21 Vict. c. 43, intituled "An act to improve the administration of the law so far as respects summary proceedings before justices of the peace," after the hearing and determination of any information or complaint by a justice in a summary way, either party dissatisfied with his decision as being erroneous in point of law, may apply for a case, to be stated and signed by the justice, setting forth the facts and grounds of his determination for the opinion thereon of one of the superior courts of law to be named by the applicant. To prevent, however, the privilege thus granted from being abused, security for costs will have to be given by the appellant. Under this statute, moreover, the court will not entertain an appeal from the decision of a magistrate upon a mere question of fact (i). And by availing himself of its provisions a person otherwise entitled to appeal to the quarter sessions will be debarred from doing so (k).

4. As regards the procedure by *habeas corpus* above specified, the reader is referred to a former volume (l). (727)

(e) *Per* Lord Kenyon, C. J., 8 T. R. 542. Even if there be such express words, the writ will lie where there is a want of jurisdiction or fraud. Paley on Conv., 5th ed., p. 410. See 24 & 25 Vict. c. 100, s. 72.

(f) *Per* Abbott, C. J. *R. v. Hanson*, 8 T. R. 521.

(g) *Per* Cur. *R. v. Reason*, 6 T. R. 876; *per* Lord Kenyon, C. J., *R. v. Smith*, 8 Id. 590.

(h) See *R. v. Barker*, 1 East, 186.

(i) *Newman v. Baker*, 8 C. B. N. S. 200.

(k) Sect. 14.

(l) *Ante*, vol. i.

It may be proper to add to what has been above said that under the stat. 23 Vict. c. 82, the crown is empowered to remit penalties summarily imposed, although wholly or in part payable to another party.

(727) By statutes which may now be viewed as part of Anglo-American common law, justices of the peace have power to hold to bail for their good behavior, or in default to commit, for definite periods, vagrants and disorderly persons. *State v. Mazzy*, 1 McMull. (S. C.) 503; 3 Whart. Cr. Law, § 2990. Similar statutes have been adopted in the United States, and have frequently been held constitutional, though with the caution that the defendant should be duly summoned, and should have a fair hearing, and that the statutes should be strictly construed. *Id.*; *People v. Forbes*, 4 Park. 611; *People v. Gray*, *id.* 616; *People v. Phillips*, 1 *id.* 95.

* CHAPTER XVIII.

[* 381]

PROCEEDINGS BEFORE THE TRIAL.

WE are now to consider the regular and ordinary methods of proceeding in courts of criminal jurisdiction; which may be distributed under three general heads, following each other in a progressive order: viz., 1st. Proceedings before the trial. 2ndly. The trial. 3rdly. Proceedings after the trial. Of these heads the first will again subdivide itself as follows:—I. Arrest. II. The examination and commitment. III. Bail; and IV. The several modes of prosecution.

I. An arrest is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime. (728)
Proceedings before the trial. To this arrest all persons whatsoever are liable in criminal cases;
I. Arrest. it may be made, 1, by, or 2, without warrant.

1. A warrant may be granted in extraordinary cases by the privy council, or by a secretary of state (a), or by either house of parliament (b). And at common law the chief justice or any puisne judge of the court of queen's bench may in his own name issue a warrant for apprehending and bringing before him any person charged on oath with felony, or suspicion of felony, though, to avoid trouble, such a warrant may direct the person when * apprehended to be taken before a justice of the peace [* 382] to be by him examined and proceeded against according to law (c): it extends all over the kingdom: and is tested, or dated, "England," not "Oxfordshire," "Berks," or other particular county.

Most commonly, however, a warrant is granted by a justice of the peace, whose power to grant it we will consider (1) at common law, (2) by statute.

(1.) A justice of the peace may, at common law, issue his warrant for the apprehension of an offender (d) in any case where he has jurisdiction over the offence charged, in order to compel the person accused to appear before him (e). And this power extends at common law to all treasons, felonies, and

(a) See *Leach v. Money*, *Wilkes v. Wood*, *Entick v. Carrington*, and Note thereto, *Broom's Con. L.*, pp. 525—623.

(b) *Case of the Sheriff of Middlesex*, and Note thereto, *Broom's Con. L.* pp. 960, 966, *et seq.*; *R. v. Flower*, 8 T. R. 814.

(c) *Chitty Cr. L.* i. 86.

(d) *Bans v. Mathuen*, 2 Bing. 68; *Hawk. P. C.* b. 2, c. 18, s. 15; 12 Rep. 181.

(e) 2 *Hawk. P. C.* 84.

(728) Some degree of corporal control is ordinarily necessary to constitute an arrest. But an arrest may be complete without corporal touch or control; as where the party to be arrested submits on being informed of the intended arrest. *Emery v. Chesley*, 18 N. H. 198. See *State v. Phinney*, 43 Me. 884; *Wood v. Kinsman*, 5 Vt. 588. Notice of arrest is, however, essential; and without it no amount of physical restraint is sufficient. *Yates v. People*, 83 N. Y. (5 Tiff.) 509. But this notice may be given by implication. *Id.*; *People v. Pool*, 27 Cal. 571.

The arrest should be made without unnecessary violence. *State v. Mahon*, 8 Harr. (Del.) 568. See *Gardiner v. Thibodeau*, 14 La. Ann. 732; *Brady v. Price*, 19 Tex. 285; *Dill v. State*, 25 Ala. 15; *Morton v. Bradley*, 80 id. 683. And the arrested person should be kindly treated; though it is for the officer to judge as to the severity of measures necessary to prevent an escape. *State v. Staloup*, 2 Ired. (N. C.) 50. A prisoner escaping after a lawful arrest may be retaken by the officer without a fresh warrant (*Cooper v. Adams*, 2 Blackf. [Ind.] 394), even where the officer has consented to the escape. *Com. v. Sheriff*, 1 Gratt. (Va.) 127.

breaches of the peace. Sir Edward Coke (*f*) indeed has laid it down that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion, nor till an indictment has been actually found (*g*): a doctrine which sir Matthew Hale has combated with invincible authority, and strength of reason: maintaining that a justice of the peace has, irrespective of statute, power to issue his warrant to apprehend a person accused of felony, though not yet indicted (*h*): and that he may also issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party who prays his warrant; because the justice is a competent judge of the probability offered to him of such suspicion. But he says, in both cases, it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there has been a felony or other crime actually committed, without which no warrant should be granted; as also to prove the cause and probability of suspecting the party against whom the warrant is prayed (*i*). The warrant [*383] * was at common law required to be under the hand and seal of the justice, to set forth the time and place of making it, and the cause for which it was made, and to be directed to the constable, or other peace officer, (or, it might be, to a private person by name (*k*)), requiring him to apprehend and bring up the party for examination (*l*). A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, was long since held to be illegal and void for its uncertainty (*m*); for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant (*n*): for the point, upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not. It is therefore in fact no warrant at all; for it will not justify the officer who acts under it; whereas a warrant, properly penned (even though the magistrate who issues it should exceed his jurisdiction), will, by statute 24 Geo. 2, c. 44, at all events indemnify the officer who executes the same ministerially.

[*384] (2.) It would be useless to inquire any further concerning * the power of a justice to arrest at common law, inasmuch as this branch of his jurisdiction is now regulated by statute.

The 11 & 12 Vict. c. 42 (*o*), provides that where a charge or complaint, which need not be in writing or on oath (*p*), is made before a justice of the peace,

(*f*) 4 Inst. 176; see 2 Hawk. P. C. 84.

(*g*) *Post*, c. 19.

(*h*) 2 Hale, P. C. 108.

(*i*) 2 Hale, P. C. 110.

(*k*) Salk. 178.

(*l*) 2 Hawk. P. C. 85.

(*m*) 1 Hale, P. C. 580; 2 Hawk. P. C. 83.

(*n*) A practice had obtained in the secretary of state's office ever since the Restoration, grounded on some clauses in the acts for regulating the press, of issuing general warrants to take up (without naming any person in particular) the authors, printers, or publishers of such obscene or seditious libels, as were particularly specified in the warrant. When those acts expired in 1694, the same practice was inadvertently continued, in every reign and under every administration, except the four last years of Queen Anne, down to

the year 1768; when such a warrant being issued to apprehend the authors, printers, and publishers of a certain seditious libel, its validity was disputed; and the warrant was adjudged by the court of king's bench to be void, in *Leach v. Money*, Broom's Cons. L., pp. 525, 618, *et seq.* After which the issuing of such general warrants was declared illegal by a vote of the House of Commons. (Com. Journ. 22nd April, 1768.)

(*o*) Of which ss. 29 & 30 give to the metropolitan city and stipendiary magistrates powers under the act similar to those conferred upon them by the 11 & 12 Vict. c. 43, *ante*, p. 870.

(*p*) S. 8. No objection can be taken to the information or complaint for any alleged defect therein in substance or in form. *Id.*

that any person has committed or is suspected to have committed any treason, felony, or indictable misdemeanor, within the limits of his jurisdiction, or that any person guilty or suspected to be guilty of having committed any such crime or offence elsewhere out of the jurisdiction of such justice is or is suspected to be within the limits of his jurisdiction, then if the person so charged or complained against is not in custody, the justice may issue a summons directed to such person stating shortly the matter of the information, and requiring him to appear before the justice at a time and place to be therein mentioned; and if after being served (*q*) with the summons the party fail to appear thereto, a warrant may be issued to bring him before the justice to answer to the charge (*r*).

The justice may also issue a warrant in the first instance where the charge or complaint is made in writing on the oath or affirmation of the informant, or some witness or witnesses in that behalf; nor will the fact that a summons has been granted preclude the justice from issuing a warrant at any time before or after that mentioned in the summons for the appearance of defendant (*s*). The warrant may issue where the offence charged was *committed [**385*] within the Admiralty jurisdiction or on land beyond the seas, if cognizable in this country (*t*).

The constable receiving the warrant is bound to execute it so far as the jurisdiction of the magistrate who issued it extends (*u*). But the warrant of a justice of the peace in one county, as Yorkshire, must be backed by a justice of the peace in another, as Middlesex, before it can be executed there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county: but the practice of backing warrants had long prevailed without law, and was at last authorized by statute. The provisions now operative as to the backing of warrants for the apprehension of persons charged with the commission of indictable offences are contained in the 11 & 12 Vict. c. 42 (*x*), which *inter alia* enacts (*y*) that if the person against whom any such warrant shall be issued be not found within the jurisdiction of the justice who issued it, or if he shall escape, or be in any place in England or Wales out of the jurisdiction of such justice, it shall be lawful for any justice of the peace for the county or place into which such person shall so escape, or in which he shall be, upon proof being made on oath of the handwriting of the justice issuing the warrant, to make an indorsement on the same authorizing its execution within his own jurisdiction, and such indorsement will be sufficient authority to the person bringing such warrant, and also to all constables of the county or place where such warrant is so *indorsed, to execute the [**386*] same in such other county or place, and to carry the person against

(*q*) The summons is served by a constable upon the person to whom it is directed by delivering it to him personally, or if he cannot conveniently be met with, by leaving the same with some person for him at his last or most usual place of abode. Sect. 9.

(*r*) Sects. 1, 9, 10.

By s. 4 the warrant may be issued on a Sunday.

(*s*) Sect. 1.

(*t*) Sect. 2.

(*u*) The powers of a justice who is also in the commission of the peace for an adjoining county, and the duty of the constable arresting an offender in either county for which

the justice acts, are defined by ss. 5, 6, of the 11 & 12 Vict. c. 42, and see s. 7.

(*x*) Sects. 11—15.

These provisions so far as relevant are applicable also to warrants issued under the summary jurisdiction of a justice, see 11 & 12 Vict. c. 43, s. 8.

(*y*) Sect. 11.

English warrants may be backed in Ireland (s. 12), or the Channel Islands (s. 13), and *vice versa*. Also English or Irish warrants may be backed in Scotland (s. 14); and Scotch warrants may be backed in England or Ireland (s. 15). And see 31 & 32 Vict. c. 107.

whom such warrant shall have issued, when apprehended, before the justice who first issued the warrant. (729)

2. An arrest, without warrant, may be made (1) by a justice of the peace; who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence (z): (2) by the sheriff (a), and (3) by the coroner (b), who may apprehend a felon within the county without warrant. (4) By a constable, who has great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for a breach of the peace committed in his view, and carry him before a justice of the peace. He may also upon probable suspicion of felony arrest the suspected felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken; and if the constable or his assistants be killed in attempting such arrest, it is murder in all concerned (c).

Under the 25 & 26 Vict. c. 114 ("An act for the prevention of poaching"), s. 2, a constable is empowered, in any public place, without warrant, to search any person "whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game," and having in his possession any game unlawfully obtained, or any gun, net, or engine used for killing or taking game.

[* 387] 3. Other statutory provisions have before been noticed (d), * which empower peace officers or even private persons to apprehend without warrant under special circumstances, and to what was there said we may add, that (5) an arrest may thus be made by a private person present when any felony is committed, who is indeed bound by law to arrest the felon, on pain

(z) 1 Hale, P. C. 86.

(a) Watson Sher. 2nd ed. p. 2. The sheriff may arrest a person though merely suspected of a capital offence, 2 Hale, P. C. 87; and, if assaulted in the execution of his office, he may arrest the offender. 1 Saund. 77; *Spilsbury v. Micklethwaite*, 1 Taunt. 146.

(b) Jerv. Cor. 3rd ed. p. 31.

(c) 2 Hale, P. C. 88—96. An arrest may be

made by a constable without a warrant under stat. 32 & 33 Vict. c. 99, ss. 3 & 8; see, also, as to searching for stolen goods, *id.* s. 11.

As to the powers of the metropolitan and county police constables in this respect, see the 10 Geo. 4, c. 44, s. 7; 2 & 3 Vict. c. 47, and c. 93; as to special constables, see 1 & 2 Will. 4, c. 41.

(d) *Ante*, p. 306 (b), p. 324.

(729) An officer will be protected in executing a warrant of arrest, legal and regular upon its face. *State v. Weed*, 1 Fost. (N. H.) 262. But if the warrant is illegal on its face, or if the magistrate had no jurisdiction, the officer then acts at his peril. *Gurney v. Tifts*, 37 Me. 130; *Noles v. State*, 24 Ala. 672; *Hall v. Howard*, 10 Conn. 514; *Sanford v. Nichols*, 13 Mass. 286; *Sleight v. Ogle*, 4 E. D. Smith, 445; *State v. McDonald*, 3 Dev. (N. C.) 468. Though it is otherwise as to one assisting the officer, in good faith, in making an arrest under such a warrant. *Reed v. Rice*, 2 J. J. Marsh. (Ky.) 44.

An officer known to be such need not show his warrant before making an arrest. Every one is bound to know the character of an officer who is acting within his proper jurisdiction, and every citizen is bound to submit peaceably to such officer, until he can demand and investigate the cause of his arrest. *State v. Townsend*, 5 Harr. (Del.) 487; *Com. v. Cooley*, 6 Gray (Mass.), 350; *Drennan v. People*, 10 Mich. 169; *Arnold v. Steeves*, 10 Wend. 514; *Boyd v. State*, 17 Ga. 194. But where the officer is not known to be such, he must show his warrant before making the arrest. *Arnold v. Steeves*, 10 Wend. 514; *State v. Curtis*, 1 Hayw. (N. C.) 471; *Com. v. Field*, 13 Mass. 321.

A warrant to search the dwelling-house of a person only authorizes the officer to search the house in which such person lives; and a house owned by him but occupied by another person cannot be lawfully searched under the warrant. *McGlinchy v. Barrows*, 41 Me. 74. The description of the place to be searched should be as certain in a warrant as would be necessary in a deed to convey such place. *Jones v. Fletcher*, 41 *id.* 254.

of fine and imprisonment (e), and may justify breaking open doors upon following such felon (f): and may kill him, provided he cannot be otherwise taken; though if the person endeavouring to make such arrest be killed, it is murder (g). Upon probable suspicion also a private person may arrest a felon, or other person so suspected (h). But he cannot justify breaking open doors to do it; and if either party kill the other in the attempt, it is manslaughter, and no more (i). It is no more, because there is no malicious design to kill: but it amounts to so much, because it would be of most pernicious consequence, if, under pretence of suspecting felony, any private person might break open a house, or kill another; and also because such arrest upon suspicion is barely permitted by the law, and not enjoined, as in the case of those who are present when a felony is committed. As regards an arrest upon suspicion without warrant, there is, moreover, this distinction to be noticed between the cases where it is made by a private individual and by a constable; in order to justify the former in causing the imprisonment, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed, whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities (k).

* 4. There is yet another species of arrest, wherein both officers [* 388] and private men are concerned, and that is, upon hue and cry raised where a felony has been committed. A hue (from *huer*, to shout) and cry, *hutesium et clamor*, is the old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another (l). Hue and cry (m) may be raised either by precept of a justice of the peace, or by a peace-officer, or by any private man who knows of a felony; and in the prosecution of such hue and cry the constable and his attendants have the same powers, protection, and indemnification, as if acting under the warrant of a justice of the peace (n). But if a man wantonly or maliciously raises a hue and cry, without cause, he shall be punished as a disturber of the public peace (o). (730)

(e) 2 Hawk. P. C. 74.

(f) A private person may justify breaking and entering a man's house and imprisoning him, to prevent him from murdering his wife, who cries out for assistance. *Handcock v. Baker*, 2 Bos. & P. 260.

(g) 2 Hale, P. C. 77.

(h) Stat. 30 Geo. 2, c. 24.

(i) 2 Hale, P. C. 82, 83.

(k) Per Lord Tenterden, C. J., *Beckwith v. Philby*, 6 B. & C. 638—9.

(l) Bracton, l. 3, tr. 2, c. 1, s. 1; *Mirr.* c. 2, s. 6.

(m) 2 Hale, P. C. 100—104.

(n) The pursuers under hue and cry, if the party suspected is actually in a house, may break open the outer door to secure him, after previous demand of admittance. 2 Hale, P. C. 103. They should, however, ascertain that fact, as, if he be not found, they will be trespassers. *Id. ibid.* Chitty, Cr. L. i. 30.

(o) 1 Hawk. P. C. 75.

(730) Where an offense is committed in view of a magistrate, within his jurisdiction, he may order the offender into custody, and proceed to his trial. A warrant and affidavit are unnecessary in the first instance. *Lancaster v. Lane*, 19 Ill. 242. And see *O'Brien v. State*, 12 Ind. 869; *Holcomb v. Cornish*, 8 Conn. 375; *Hoggatt v. Bigley*, 6 Humph. (Tenn.) 236; *Tracy v. Williams*, 4 Conn. 107.

The sheriff is, *ex officio*, a conservator of the peace. *Coyles v. Hurtin*, 10 Johns. 85; *Stage Horse Cases*, 15 Abb. N. S. 51, 61. And sheriffs, constables, watchmen, and like officers, for all offenses committed in their presence may arrest without warrant. *Com. v. Deacon*, 8 Serg. & R. (Penn.) 47; *State v. Brown*, 5 Harr. (Del.) 505; *State v. Ferguson*, 2 Hill (S. C.), 619; *City Council v. Payne*, 2 Nott & Mc. (S. C.) 475; *Spalding v. Preston*, 21 Vt. 9. But for past offenses the power to arrest without warrant is limited to cases of felony and

In order to encourage the apprehending of offenders, rewards are sometimes bestowed on such as bring them to justice, under the sanction of divers acts of parliament (*p*).

II. The justice before whom a person charged with the commission of an indictable offence appears in obedience to a summons (*g*) or after arrest made by any of the means above mentioned, will proceed to deal with the accused in accordance with the requirements of the statute law (*r*). The justice will hear and put into writing the evidence of the witnesses produced against the defendant given on oath or affirmation in his presence (*s*)—the accused being at liberty to put questions to any such * witness (*t*), and when the depositions have been taken, read [**389*] over to the witnesses and duly signed, the accused will be addressed by the justice in these words, or to this effect:—"Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything else you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial" (*u*). Should the accused person in answer to the question thus addressed to him desire to make a statement, the justice will first give him clearly to understand that "he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwith-

(*p*) *Post*, c. xix.
 (*g*) *Ante*, p. 384.
 (*r*) See 11 & 12 Vict. c. 42; 30 & 31 Vict. c. 35.

(*s*) 11 & 12 Vict. c. 42, s. 17. See *Reg. v. Watts*, L. & C. 839.
 (*t*) 11 & 12 Vict. c. 42, s. 17.
 (*u*) Sect. 18.

breaches of the peace. See *Com. v. McLaughlin*, 12 Cush. (Mass.) 615; *Com. v. Carey*, id. 246. And in the latter cases the arrests must be made within a very short time after the offense. After two hours has been held too late. *Regina v. Walker*, 25 Eng. Law & Eq. 589; *Dutolph v. Blust*, 5 Lans. 84; S. C., 41 How. 481. And see *Boyleston v. Kerr*, 2 Daly, 220; *Taylor v. Strong*, 3 Wend. 384.

An officer, as just mentioned, has the right to call upon private individuals to assist in the arrest of persons charged with past felony, or to prevent the commission of an offense, and to refuse such assistance is indictable. *Coyle v. Hurtin*, 10 Johns. 85; *Mitchell v. State*, 7 Eng. (Ark.) 50; *State v. Shaw*, 3 Ired. (N. C.) 20. Private persons thus acting must be either actually or constructively under an officer's command. *People v. Moore*, 2 Doug. (Mich.) 1. See *Com. v. Field*, 13 Mass. 321; *Coyle v. Hurtin*, 10 Johns. 85.

An arrest of a felon may be justified by any person without warrant, whether there be time to obtain one or not, if a felony has in fact been committed by the person arrested. And if an innocent person is arrested upon suspicion by a private individual, such individual is excused, if a felony was in fact committed, and there was reasonable ground to suspect the person arrested (*Burns v. Erben*, 40 N. Y. [1 Hand] 463; *Reuck v. McGregor*, 3 Vroom [N. J.], 70; *Holly v. Mia*, 3 Wend. 350; *Brockway v. Crawford*, 3 Jones [N. C.], 434; *State v. Roane*, 2 Dev. [N. C.] 58; *Com. v. Deacon*, 8 Serg. & R. [Penn.] 48; *Brooks v. Com.*, 61 Penn. St. 352; *Hawley v. Butler*, 54 Barb. 490); but an officer is justified in making an arrest without warrant, though no felony has been actually committed, if he has reasonable ground to suspect that one has been, and acts in good faith and without evil design. *Burns v. Erben*, 40 N. Y. (1 Hand) 463; *Eanes v. State*, 6 Humph. (Tenn.) 58; *Rohan v. Sawin*, 5 Cush. (Mass.) 281; *Com. v. Presby*, 14 Gray (Mass.), 65.

When a breach of the peace is threatened, every good citizen is bound to intervene, and take proper measures to compel order. *Res. v. Montgomery*, 1 Yeates (Penn.), 419.

standing such promise or threat" (x). The justice will further ask the defendant whether he desires to call any witness; and if he shall thereupon call or desire to call witnesses, the justice will, in the presence of the defendant (y), take the statements on oath or affirmation, both on examination and cross-examination, of those who may be so called; and when put into writing such depositions will be read over to and signed respectively by the witnesses who shall have been thus examined, and also by the justice taking the same. Witnesses may be compelled to attend and give evidence before the justice (z), in like manner as where the examination is with a view to summary conviction (a) and the deposition of a person dangerously ill and not likely to recover may now be taken by the justice conformably to the provisions of the statute 30 & 31 Vict. c. 35 (b) in the presence of the prisoner.

The examination may be adjourned from time to time (c), * when [* 390] necessary, as if a variance likely to have misled the prisoner appear between the warrant under which he was arrested and the evidence adduced against him (d).

When completed, the accused will be either discharged, or allowed to go at large on bail, or committed (e), the prosecutor and witnesses in this latter event being bound over in recognizances respectively to prosecute and give evidence, and such recognizances with the depositions, of which the prisoner is entitled to a copy (f), and statement (if any) of the accused, will be transmitted to the court in which the trial is to be (g).

Should the justice, however, refuse to commit or to bail the accused when charged with any of the following offences, viz. perjury, subornation of perjury, conspiracy, obtaining property by false pretences, keeping a gambling or disorderly house, or an indecent assault; and should the prosecutor desire to prefer an indictment for the same, the justice will take the recognizance of the prosecutor to prosecute the said charge or complaint, and will transmit such recognizance, together with the information and depositions, to the court in which the indictment ought to be preferred in like manner as if the defendant had been committed (h).

III. Holding to bail may be defined as a delivery, or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance: he being supposed to continue in their friendly custody, instead of going to gaol. (731)

That branch of magisterial jurisdiction which has reference to the taking of bail is most important, and cases which fall within it may be thus classified:—

- (x) Id.
- (y) 30 & 31 Vict. c. 35, s. 3.
- (z) Sect. 16.
- (a) *Ante*, p. 372.
- (b) Sects. 6, 7.
- (c) 11 & 12 Vict. c. 42, s. 21.

- (d) Sect. 10.
- (e) Sect. 25.
- (f) Sect. 27.
- (g) Sect. 20.
- (h) 22 & 23 Vict. c. 22, s. 2.

(731) To justify the holding of the prisoner for trial in the higher court, it is not necessary that the evidence should be sufficiently conclusive to authorize his conviction if the crime charged were within the magistrate's jurisdiction. The alleged offense appearing to have been committed, probable cause to believe the defendant to be the guilty person is all that is required. 1 Bish. Cr. Proced., § 233; *State v. Hartwell*, 35 Me. 129.

[*391] 1. No person charged with treason can be admitted to * bail except by order of a secretary of state or by the Court of Queen's Bench, or, in vacation, by a judge thereof (*i*).

2. It is discretionary with the justice to admit the defendant to bail, on a charge of felony, or assault with intent to commit felony, or an attempt to commit it, or of obtaining or attempting to obtain property by false pretences, or of a misdemeanor in receiving property stolen or obtained by false pretences, or of perjury, subornation of perjury, concealing the birth of a child, exposure of the person, riot, assault in pursuance of a conspiracy to raise wages, assault upon a peace officer in the execution of his duty, or any one acting in his aid, neglect or breach of duty as a peace officer, or any misdemeanor for the prosecution of which the costs may be allowed out of the county rate (*k*).

3. The justice is required to admit to bail a defendant charged with any indictable misdemeanor other than those above-mentioned (*l*).

Subject to the foregoing regulations a defendant may be bailed after he has been committed to prison and before the commencement of the session at which he is to be tried (*m*), in which case a warrant for his deliverance will be sent to the keeper of the gaol (*n*).

The duty of a justice of the peace in regard to the taking of bail is essentially judicial (*o*). It is incumbent on him to take sufficient bail to ensure the appearance of the accused to take his trial, and as guiding to a determination on this point, three elements will generally be found important:—(1) the charge; (2) the nature of the evidence by which it is supported; and, (3) the punishment to which the defendant would be liable if convicted (*p*).

[*392] Should the justice improperly refuse to take bail, the * hardship thus caused to the defendant will be relieved on application to a higher tribunal, for it is agreed that the court (*q*) of queen's bench (or any judge (*r*) thereof in time of vacation) may bail for any crime whatsoever, be it treason (*s*), murder (*t*), or any other offence, according to the circumstances of the case (*u*). And herein the wisdom of the law is very manifest. To allow bail to be taken commonly for the more serious crimes, would greatly tend to elude the public justice: and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence. The law has therefore provided one court, and only one, which has a discretionary power of bailing in any case: excepting only, even from this high jurisdiction, and of course from all inferior ones, such persons as are committed by either house of parliament, so long as the session lasts: or such as are committed for contempts by any of the queen's superior courts of justice (*x*).

(*i*) 11 & 12 Vict. c. 42, s. 23.

(*k*) *Id.*

(*l*) *Id.*

(*m*) *Id.*

(*n*) Sect. 24.

(*o*) *Linford v. Fitzroy*, 18 Q. B. 240; *Reg. v. Badger*, 4 Q. B. 468.

(*p*) *Barronet's Case*, 1 E. & B. 1.

(*q*) 2 Inst. 189; Latch. 12; Vaugh. 157; Comb. 111, 298; 1 Comyn Dig. 497.

(*r*) Skin. 683; Salk. 105; Stra. 911; 1 Comyn Dig. 497.

(*s*) In the reign of Queen Elizabeth it was the unanimous opinion of the judges, that no

court could bail upon a commitment, for a charge of high treason, by any of the queen's privy council. (1 Anders. 296.) As to which, see, *per* Lord Camden, *Entick v. Carrington*, Broom Constit. L. 581—3.

(*t*) *In omnibus placitis de felonis solet accusatus per plegios dimitti, praterquam in placito de homicidio.* (Glanv. l. 14, c. 1.) *Sciendum tamen quod, in hoc placito, non solet accusatus per plegios dimitti, nisi ex regis potestatis beneficio.* (Ib. c. 3.)

(*u*) See *Barronet's Case*, 1 E. & B. 1.

(*x*) Staundf. P. C. 78, b.

Lastly, under our present head, the reader will remember that to refuse or delay to bail any person bailable, is an offence against the liberty of the subject, in any magistrate, by the common law (y); as well as by the *habeas corpus* act, 31 Car. 2, c. 2 (z). And, lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, *it is expressly declared by statute 1 Will. & M. st. 2, c. 1, that excessive bail ought not to be required; though what bail shall [* 393] be called excessive, must be left to the court, on considering the circumstances of a case, to determine. On the other hand, if the magistrate takes insufficient bail, he is liable to be fined, if the criminal does not appear (a).

If the offence be not bailable, or the party cannot find bail; he is to be committed to gaol, there to abide till delivered by due course of law (b). But such imprisonment is only for safe custody, not for punishment: therefore in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, nor subjected to other hardships than such as are absolutely requisite for the purpose of confinement only. The law (it was long since held) would not justify the gaoler in fettering a prisoner, unless where he was unruly, or had attempted to escape (c): this being the humane language of our ancient law-givers (d), "*custodes pœnam sibi commissorum non augeant, nec eos torqueant; sed omni sævitâ remotâ, pietateque adhibitâ, judicia debite exequantur.*" (732)

IV. Modes of prosecution. IV. The next step towards the punishment of an offender is his formal accusation, which is made either, 1, without, or, 2, with a jury intervening.

1. Without a jury. 1. Under the former subdivisions may be mentioned:—
(1.) Trial of a thief taken with the mainour. (1.) The summary mode of procedure which formerly existed at common law, when a thief was taken "with the mainour,"

(y) 2 Hawk. P. C. 90.

(b) 2 Hale, P. C. 122.

(z) *Ante*, vol. 1.

(c) 2 Inst. 381; 8 Inst. 84.

(a) 2 Hawk. P. C. 89: see 7 Geo. 4, c. 64, ss. 5, 6.

(d) 1 Flet. l. 1, c. 26.

(732) The constitution of the United States provides that "excessive bail shall not be required." U. S. Const. Amend., art. 8. And by act of congress it is provided that "upon all arrests in criminal cases bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of the district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence and the usages of law." Act of September 24, 1789. In most of the States there are similar provisions. See *State v. James*, 37 Conn. 355; *Haley v. People*, Breece (Ill.), 81; *Ex parte Wray*, 30 Miss. 678; *State v. Summons*, 19 Ohio, 189; *Ullery v. Com.*, 8 B. Monr. (Ky.) 8; *Shore v. State*, 6 Mo. 640. At common law all offenses of whatever degree are bailable within the judicial discretion; but if the offense with which the defendant is charged is punishable with death, and the proof of guilt is evident, or the presumption great, bail will be refused." See *People v. Hyler*, 2 Park. 570; *State v. Rockefeller*, 1 Halst. (N. J.) 832; *State v. Hill*, 3 Brev. (S. C.) 89; *Heffren, ex parte*, 27 Ind. 87; *U. S. v. Stewart*, 2 Dall. 843; *State v. McNab*, 20 N. H. 160; *Lynch v. People*, 88 Ill. 494; *Thompson v. State*, 25 Texas, 395; *Bird, ex parte*, 24 Ark. 275; *Beall v. State*, 39 Miss. 715. In misdeemeanors it is the right of the person in ordinary cases to give bail. *People v. Johnson*, 2 Park. 322; *People v. Kennedy*, id. 312.

After a refusal to grant bail it is within the discretion of the court to decline looking a second time into the question. *Campbell, ex parte*, 2 Ala. 89. See *Kittrel, ex parte*, 20 Ark. 499; *People v. Cunningham*, 3 Park. 531.

that is, with the thing stolen upon him *in manu*. For he might when so detected, *flagrante delicto*, have been brought into court, arraigned, and tried, without indictment. But this proceeding was taken away by several statutes in the reign of Edward III. (e).

[* 394] * (2.) The proceeding by information. Informations are of two sorts: first those which are partly at the suit of the sovereign, and partly at that of a subject; and secondly, such as are only in the (2.) Information. name of the sovereign. The former are brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the crown, and another to the use of the informer; and are a sort of *quittan* actions (the nature of which was explained in a former volume (f)) only carried on by a criminal instead of a civil process.

Informations exhibited in the name of the queen alone, are also of two kinds: first, those which are truly and properly her own suits, and filed *ex officio* by her own immediate officer, the attorney-general; secondly, those in which, though the queen is the nominal prosecutrix, yet it is at the relation of some private person or common informer; and these are filed by the queen's coroner and attorney in the court of queen's bench, usually called the master of the crown-office, who is for this purpose the standing officer of the public. Prosecutions, filed *ex officio* by the queen's attorney-general, are properly levelled at such great offences, less, however, in degree than treason, felony, or misprision of treason, as peculiarly tend to disturb or endanger her government, or to molest or affront her in the regular discharge of her royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay might be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for previous application to any other tribunal: which power, thus necessary, not only to the ease and safety, but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts. The object of the other species [* 395] of information, filed by the master of the crown office, with leave * of the court of queen's bench upon the complaint or relation upon oath (g) of a private subject, is any gross and notorious misdemeanor, riot, battery, libel, or other immorality of an atrocious kind (h), not peculiarly tending to disturb the government (for any such is left to the care of the attorney-general), but which, on account of its magnitude or pernicious example, deserves the most public animadversion.

Upon motion made for a criminal information the court will take into consideration all the various circumstances of the charge, before they lend their sanction to this extraordinary mode of prosecution. They will observe the time of making the application, whether a long interval has elapsed since the alleged wrong, and if so to what cause it may fairly be ascribed; they will examine the evidence on which the charge is founded, and will consider the character and motives of the applicant in regard to the matter before them; and they will look forward to the consequences of the rule which they are requested to grant and the peculiar situation of the defendant (i). In support of an application of this nature for a libel, the applicant must, unless the

(e) 2 Hale, P. C. 149.

(f) *Ante*, vol. iii.

(g) 4 & 5 Will. & M. c. 18.

(h) 2 Hawk. P. C. 260.

(i) *R. v. Robinson*, 1 W. Bla. 542.

charge be so general as to make it impossible, show his innocence of the matter imputed to him (*k*), and where the motion for a criminal information is made against a magistrate for anything done in the execution of his office, an imputation of corrupt or vindictive motives must be made (*l*), and previous notice of the intended application must be given to him (*m*). When an information is filed, either thus under the direction of the court or by the attorney-general *ex officio*, and the case is not of such importance as to be tried at bar, *it will be sent down by writ of *nisi prius* into the county where the [* 396] offence is charged to have been committed, and will be there tried by a common or special jury, like a record in a civil action; and if the defendant is found guilty, he will afterwards receive judgment from the court of queen's bench (*n*).

There can be no doubt but that this mode of prosecution by information (or suggestion), filed on record by the queen's attorney-general, or by her coroner or master of the crown-office in the court of queen's bench, is as ancient as the common law itself (*o*). For as the crown was bound to prosecute, or at least to lend the sanction of its name to a prosecutor, whenever a grand jury informed it upon their oaths that there was a sufficient ground for instituting a criminal suit: so, when these its immediate officers were otherwise sufficiently assured that a man had committed a gross misdemeanor, either personally against the sovereign or government, or against the public peace and good order, they were at liberty, without waiting for any further intelligence, to convey that information to the court held in theory *coram rege* by a suggestion on record, and to carry on the prosecution in the sovereign's name. But these informations (of either kind) are confined by our constitutional law to misdemeanors only: for, wherever any felony is charged, the same law requires that the accusation be warranted by the oath of twelve men before the party shall be put to answer it. And, as to those offences, in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in the highest criminal tribunal, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the *prosecution had originally been by indictment. [* 397] But when the statute 3 Hen. 7, c. 1, had extended the jurisdiction of the court of star-chamber, the members of which were the sole judges of the law, the fact, and the penalty; and when the statute 11 Hen. 7, c. 3, had permitted an information to be brought by any informer upon any penal statute, not extending to life or member, at the assizes or before the justices of the peace, who were to hear and determine the same according to their own discretion; then it was, that the legal and orderly jurisdiction of the court of king's bench fell into disuse and oblivion, and Empson and Dudley (the wicked instruments of king Henry VII.) by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices (*p*), continually harassed the subject, and shamefully enriched the crown. The

(*k*) *R. v. Miles*, 1 Dougl. 283, 284; *R. v. Has-*
well, Id. 887; *R. v. Jolliffe*, 4 T. R. 289; *R. v.*
Williams, 5 B. & Ald. 595.

(*l*) *R. v. Borron*, 3 B. & Ald. 432.

(*m*) *R. v. Heming*, 5 Ad. & E. 666.

(*n*) As to the trial of an information for
libel, see 6 & 7 Vict. c. 96.

(*o*) 1 Show. 118.

(*p*) 1 And. 157.

latter of these acts was soon indeed repealed by statute 1 Hen. 8, c. 6, but the court of star-chamber continued in high vigour, and daily increasing its authority, for more than a century longer; till finally abolished by statute 16 Car. 1, c. 10.

Upon this dissolution of the star-chamber the old common law (*q*) authority of the court of queen's bench, as the *custos morum* of the nation, being found necessary to reside somewhere for the peace and good government of the kingdom, was again revived in practice (*r*). And it is observable, that in the same act of parliament which abolished the court of star-chamber, a conviction by information is expressly reckoned up, as one of the legal modes of conviction of such persons as should offend a third time against the provisions of that statute (*s*). It is true, Sir Matthew Hale, who presided in this court soon after the time of such revival, is said (*t*) to have been no friend to this method of prosecution: and, if so, the reason * of such his dislike was probably the ill use which the master of the crown-office then made of his authority, by permitting the subject to be harassed with vexatious informations, whenever applied to by any malicious or revengeful prosecutor; rather than any doubt being entertained by him of their legality, or propriety upon urgent occasions (*u*). For the power of filing informations, without any control, then resided in the breast of the master, and being filed in the name of the king, they subjected the prosecutor to no costs, though on trial they proved to be groundless. This oppressive use of them, in the times preceding the revolution, occasioned a struggle, soon after the accession of king William (*x*), to procure a declaration of their illegality by the judgment of the court of king's bench. But Sir John Holt, who then presided there, and all the judges, were clearly of opinion that this proceeding was grounded on the common law, and could not be then impeached. And, in a few years afterwards, a more temperate remedy was supplied in parliament, by statute 4 & 5 Will. & M. c. 18, enacting that the clerk of the crown shall not file any information without express direction from the court of king's bench: and that every prosecutor, permitted to promote such information, shall give security by a recognizance of 20*l*. (which now seems to be too small a sum) to prosecute the same with effect; and to pay costs to the defendant, in case he be acquitted thereon, unless the judge, who tries the information, shall certify that there was reasonable cause for filing it; and, at all events, to pay costs, unless the information shall be tried within a year after issue joined (*y*). But there is a proviso in this act, that it shall not extend to any informations other than those which are exhibited by the master of the crown office: and, [* 399] * consequently, informations filed by the attorney-general are no way restrained thereby (*z*). (733)

(*q*) 5 Mod. 484.

(*r*) Styl. Rep. 217, 245; Styl. Prac. Reg. tit. Information, pag. 187 (edit. 1657); 2 Sid. 71; 1 Sid. 152.

(*s*) Stat. 16 Car. 1, c. 10, s. 6.

(*t*) 5 Mod. 480.

(*u*) 1 Saund. 801. 1 Sid. 174.

(*x*) M. 1 W. & M. 5 Mod. 459; Comb. 141; Farr. 361; 1 Show. 106.

(*y*) As to costs for the defendant upon a criminal information for libel, see 6 & 7 Vict. c. 96, s. 8.

(*z*) As to informations in the nature of *quo warranto*, ante, vol. iii.

(733) It is provided by the constitution of the United States that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except, etc. (U. S. Const. Amend., art. 5); but this provision applies only to cases in the United States courts. *Rowan v. State*, 30 Wis. 129; *State v. Keyes*, 8 Vt. 57;

2. In each of the remaining methods of prosecution there is a previous finding by a jury to fix the authoritative stamp of verisimilitude upon the accusation.

(1.) Where the coroner's inquisition is taken concerning the death of a man, and a verdict of guilty of murder or manslaughter is returned (*a*). Upon this inquisition the offender so prosecuted may be arraigned and tried without the intervention of a grand jury (*b*), and if an indictment be found for the same offence, and the defendant be acquitted on the one, he must be arraigned on the other, to which he may, however, effectually plead his former acquittal (*c*).

Various defects in an inquisition which would formerly have rendered it invalid are no longer material (*d*), and its form has been simplified by 24 & 25 Vict. c. 100, s. 6 (*e*).

(2.) Where a presentment is made by the grand jury. Presentment is a very comprehensive term; properly speaking, however, it is the notice taken by a grand jury of an offence from their own knowledge or observation (*f*), without any bill of indictment laid before them; as of a nuisance, or a libel, upon which the officer of the court must afterwards frame an indictment (*g*), before the party presented can be put to answer. (734)

(3.) Where a bill of indictment is preferred: an indictment being a written accusation of one or more persons * of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury (*i*). To this end the sheriff of each county is bound to return to every session of the peace, and every commission of *oyer* and *terminer*, and of general gaol delivery, twenty-four good and lawful men of the county, to inquire, present, do, and execute all those things, which on the part of our lady the queen shall then and there be commanded them (*k*). They need not be freeholders (*l*), though they usually are so, and gentlemen, moreover, of the best figure in the county (*m*). As many as appear upon this panel are sworn

(*a*) On a verdict of guilty of manslaughter the coroner is empowered to admit to bail, 23 Vict. c. 83. Where, however, the jury find that murder has been committed, the application to admit to bail must be made to the Court of Queen's Bench or to a judge.

(*b*) See *Reg. v. Ingham*, 5 B. & S. 257.

(*c*) 2 Hale, P. C. 61.

(*d*) See 14 & 15 Vict. c. 100, ss. 24, 30; 6 & 7 Vict. c. 88, s. 8.

(*e*) Which applies to an inquisition as well as to an indictment. *Reg. v. Ingham*, 5 B. & S. 257.

(*f*) Lamb. Eirenarch, l. 4, c. 5.

(*g*) 2 Inst. 739.

(*h*) In *R. v. Jolliffe*, 4 T. R. 298, Buller, J., says, "If to an action for slander in charging the plaintiff with felony a justification be pleaded, which is found by the jury, that of itself amounts to an indictment, as if it had been found by the grand inquest."

(*k*) 2 Hale, P. C. 154.

(*l*) Russ. & Ry. 177.

(*m*) As to the qualification of grand jurors of sessions of the peace, see 6 Geo. 4, c. 50, s. 1.

State v. Shumpert, 1 Rich. (S. C.) 85; *Noles v. State*, 24 Ala. 672. And in some of the States the proceeding by information is so much resorted to as to nearly supersede the indictment. See 1 Bish. Cr. Proced., § 145. Except in the mere formal parts, an information is, in its structure, precisely similar to an indictment. *People v. Higgins*, 15 Ill. 110; *State v. Miles*, 4 Ind. 577; *State v. Williams*, 8 Texas, 255.

(734) As to the practice on a presentment by the grand jury in the United States, see *State v. Mitchell*, 1 Bay (S. C.), 267; *State v. Cain*, 1 Hawks (N. C.), 353; *Bishop v. Com.*, 13 Gratt. (Va.) 785; *Com. v. Collins*, 9 Leigh (Va.), 666; *Garret v. State*, 9 Yerg. (Tenn.) 889; *Nunn v. State*, 1 Kelly (Ga.), 243; *Brock v. State*, 23 Ga. 98; *Hutcher v. State*, 28 id. 807; *U. S. v. Hill*, 1 Brock. 156.

upon the grand jury, to the amount of twelve at the least, and not more than twenty-three; that twelve (*n*) may be a majority. And it may be worthy of remark that in the time of king Richard the First (according to Hoveden) the process of electing the grand jury ordained by that prince was as follows: four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. This number was probably found too large and inconvenient; but traces of this institution remained until the passing of the statute 6 Geo. 4, c. 50, in that some of the jury must have been summoned out of every hundred. * This grand jury are previously [* 401] instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdrew, to sit and receive indictments, which are preferred to them in the name of the sovereign, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution (*p*); for the finding of an indictment is in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are merely to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be persuaded of the truth of an indictment so far as the evidence submitted to them goes; and not to rest satisfied with remote probabilities: a doctrine that might be applied to very oppressive purposes (*q*).

Although criminal procedure in this country usually commences with the inquiry before a magistrate already noticed, it is at common law the right of any private person to prefer a bill of indictment to a grand jury against another for any crime. This right has, however, in some important particulars been restricted and modified by recent statutes, for as regards perjury, subornation of perjury, conspiracy, obtaining property by false pretences, keeping a gambling or a disorderly house, or committing an indecent assault, no bill of indictment can now be preferred for any such offence unless the prosecutor has been bound by recognizance to prosecute or give evidence against the accused, or unless the accused has been committed, or has been bound over to appear to answer to an indictment, or unless the bill be preferred with the sanction of a judge or of the attorney or solicitor-general, or, in the case of bribery, of some person authorized to direct a prosecution for that offence, under the 14 & 15 Vict. c. 100 (*r*). The above statutory provision has thus far * been amended by the 30 & 31 Vict. c. 35, s. 1, [* 402] that it is not applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count for any of the offences above mentioned, founded in the opinion of the court upon the facts investigated and deposed to before the committing magistrate; and still further, to prevent the preferring of vexatious indictments, by sect. 2 of this latter statute costs may be awarded against the prosecutor of an indictment

(*n*) This was also the number of inquisitors of crimes committed within a particular district specified in the laws of king Ethelred. (Anc. L. and Inst. Eng. 125.) "*Exeant seniores duodecim thani, et præfectus cum eis, et jurent super sanctuarium quod eis in manus datur, quod nolint ullum innocentem accusare, nec aliquem noxium celare.*" Trial by jury does

not however seem to have been derived from the Anglo-Saxons. (Forsyth, Hist. Tr. Jury, chap. iv.)

(*p*) As to the swearing of witnesses examined before the grand jury, see 19 & 20 Vict. c. 54.

(*q*) 8 St. Tr. 839.

(*r*) Stat. 22 & 23 Vict. c. 17, s. 1.

coming within the provisions of the 22 & 23 Vict. c. 17, where the defendant is acquitted.

Irrespective of the general enactments above mentioned, provisions restrictive of the right to prosecute for particular offences are to be met with in the statute book (s).

There is, however, no period of limitation generally applicable to criminal proceedings (t), the maxim *nullum tempus occurrit regi* holding in favour of the crown (u). The *habeas corpus* act indeed provides, that any person committed for treason or felony must be indicted in the ensuing term or sessions, or the suspected party must be bailed, unless it be shown upon oath, that the witnesses for the prosecution could not be produced at the preceding session (x). But this regulation applies only to persons confined upon suspicion, and is solely intended to prevent the protracting of arbitrary imprisonment; so that it does not preclude the crown from preferring an indictment at any distance of time from the actual perpetration of the offence, unless some particular statute limits the time of prosecuting.

Definite periods of limitation have nevertheless been prescribed by the legislature in certain cases. Thus—indictments for such treasons as cause corruption of blood * (except treason by designing or attempting [* 403] assassination of the sovereign by poison or otherwise (y)), must be found by the grand jury within three years next after the offence committed, within England, Wales, Berwick-upon-Tweed, or Scotland (z); but if committed on the high seas or abroad, no time is limited for the prosecution.

In prosecutions for feloniously compassing, &c. to depose or to levy war against the queen, expressed by words only, information of such compassing, &c. and of the words by which the same was expressed, must be given on oath to a justice of the peace within six days after the words spoken, and a warrant must be issued for the apprehension of the party within ten days after the information so given (a).

Prosecutions on the stat. 1 Geo. 4, c. 1, to prevent the training of persons to the use of arms, must be commenced within six months after the offence (b).

Prosecutions by indictment on the stat. 9 Geo. 4, c. 69, for night-poaching, must be commenced within twelve calendar months.

Indictments or informations on any penal statute, whereby the forfeiture is limited to the crown, must be brought within two years after the offence committed; if the forfeiture be limited to the crown and the prosecutor, the suit must be within one year, and in default thereof the same must be sued for by the crown within two years after that year ended; but where any statute limits a shorter time, the suit must be brought within the time so limited (c).

The grand jury are sworn to inquire, only for the body of the county, *pro corpore comitatûs*: and cannot, therefore, regularly inquire of a fact done out of that county for which they are sworn, unless particularly enabled by act of

(s) See, for instance, 24 & 25 Vict. c. 96, ss. 80, 118; c. 97, s. 71; c. 99, s. 33.

(t) 2 Hale, P. C. 158.

Governor Wall was tried and executed for a murder committed twenty years before. 28 St. Tr. 51. On the same principle no length of time can legalize a public nuisance. *Weld v. Hornby*, 7 East, 199.

(u) Broom's Leg. Max. 4th ed. p. 66.

(x) Stat. 81 Car. 2, c. 2, s. 7.

(y) 7 & 8 Will. 3, c. 3, s. 6.

(z) Id. s. 5; Fost. 249.

(a) 11 & 12 Vict. c. 12, s. 4.

(b) Sect. 7.

(c) 81 Eliz. c. 5.

[* 404] parliament to do so (*d*). Statutory provisions, however, * thus enabling them are numerous, of which the more important are as follow (*e*):—

In an indictment for high treason or misprision of treason committed out of the realm, the venue may be laid in Middlesex, if the trial is to be in the court of queen's bench, or in such shire as the crown shall appoint, under a commission to try the offender (*f*).

In an indictment for compassing the death of the sovereign, or for any of the treasons mentioned in the stat. 36 Geo. 3, c. 7, s. 1, the venue may be laid in any county in which a sufficient overt act can be proved. So in an indictment for conspiracy, the venue may be laid in any county in which it can be proved that an act was done by any one of the conspirators in furtherance of their common design (*g*).

In indictments for endeavouring to seduce soldiers or sailors from their duty, or for inciting them to mutiny, the venue may be laid in any county, whether the offence be committed on the high seas, or in England (*h*). And in indictments for administering or taking unlawful oaths, the venue may be laid in any county in England, whether the offence was committed on the high seas, or out of the realm, or within England (*i*). In indictments for burning or destroying the queen's ships, or magazines, out of the realm, the venue may be laid in any county within the realm (*j*).

[* 405] In indictments for offences relating to the post-office, * the venue may be laid either in the county or place where the offence was committed, or where the offender was apprehended or is in custody (*j*). In indictments for offences against statutes relating to the stamp duties, the venue may be laid either in the county where the offence was committed, or in that in which the parties accused, or any of them, were apprehended (*k*). And in indictments for offences against the customs committed upon the high seas, the venue may be laid in the county into which the offender has been taken (*l*).

In indictments for resisting or assaulting officers of the excise (*m*), or for offences against the revenue of customs (*n*), the venue may be laid in any county. In indictments for offences committed by persons employed in any public service abroad, the venue may be laid in Middlesex (*o*); and in indictments for offences committed out of the kingdom against the Foreign Enlistment Act, the venue may be laid at Westminster (*p*).

In an indictment for plundering or stealing any part of a ship in distress or wrecked, or any goods belonging thereto, the venue may be laid either in the county in which the offence was committed, or in a next adjoining county (*q*). And by the 7 Geo. 4, c. 64, s. 12, wherever a felony or misdemeanor is begun

(*d*) Wherever a felony or misdemeanor is committed on the boundary of two or more counties, or within the distance of 500 yards of the boundary, the venue may be laid and the indictment tried in either county. 7 Geo. 4, c. 64, s. 12.

(*e*) As to treasons, &c., committed on the high seas, within the jurisdiction of the admiralty, *ante*, pp. 847-9.

As to felonious homicide, *ante*, p. 285.

As to accessories, *ante*, pp. 39, 40.

(*f*) In pursuance of stats. 26 Hen. 8, c. 13; 33 Hen. 8, c. 28; 35 Hen. 8, c. 2; and 5 & 6 Edw. 6, c. 11.

(*g*) See *R. v. Brisac*, 4 East, 164.

(*h*) 37 Geo. 3, c. 70, s. 2; 57 Geo. 3, c. 7.

(*i*) 37 Geo. 3, c. 123, s. 6; 53 Geo. 3, c. 104, s. 7.

(*j*) 12 Geo. 3, c. 24, s. 2.

(*k*) 1 Vict. c. 36, s. 37.

(*l*) 53 Geo. 3, c. 108, s. 25.

(*m*) 16 & 17 Vict. c. 107, s. 275.

(*n*) 8 & 4 Will. 4, c. 53, s. 123.

(*o*) 16 & 17 Vict. c. 107, s. 804.

(*p*) 43 Geo. 3, c. 85, s. 1.

(*q*) 59 Geo. 3, c. 69, s. 9.

(*r*) 24 & 25 Vict. c. 96, s. 64.

in one county and completed in another, the venue may be laid in either county, in the same manner as if it had been wholly committed therein. And if a person, having stolen or otherwise feloniously taken any chattel, money, or valuable security, or other property whatsoever, in any one part of the United Kingdom, afterwards have the same in his possession in any other part of the United Kingdom, he may be indicted for larceny in that part of the United Kingdom in which he so had the property, in the same manner * as if he had actually stolen it there (r). In an indictment for a felony or misdemeanor committed upon any person, or on or in respect [* 406] of any property, in or upon any carriage employed in any journey, or on board any vessel employed in any voyage upon any navigable river, canal, or inland navigation, the venue may be laid in any county through which the carriage or vessel shall have passed in the course of that journey or voyage, in the same manner as if the offence had been actually committed therein; and where the side, bank, centre, or other part of the highway, river, &c. shall constitute the boundary of two counties, the venue may be laid in either of the counties through or adjoining to, or by, the boundary of any part whereof the carriage or vessel may have passed in the course of the journey or voyage (s). A similar provision has been enacted as to offences committed on or in respect of mails, or persons engaged in the conveyance or delivery of letters sent by the post (t).

A receiver of property knowing the same to have been stolen, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, may be indicted in the county or place in which he has or may have had such property in his possession, or in which the person guilty of the principal felony or misdemeanor may be tried, in like manner as he may be indicted in the county or place where he actually received the property (u). If property stolen in one part of the United Kingdom be received in another, the receiver may be indicted in the latter (x); and the venue in an indictment for embezzlement by any one in the public service or in the police may be laid either in the county or place in which he was apprehended or is in custody, or in that where the offence was committed (y).

* A forger may be tried either in the county or place where the offence was committed, or in that where he is apprehended or in cus- [* 407] tody (z). And where a person utters counterfeit coin in any county or jurisdiction, and other counterfeit coin in any other county or jurisdiction on the same day, or within ten days next ensuing, or where two or more such offenders have acted in concert in different counties or jurisdictions, the venue may be laid and the offence charged to have been committed in any one of those counties or jurisdictions (a).

In an indictment for libel, or for sending a threatening letter, the venue may be laid either in the county from which it was sent, or in that in which the prosecutor received it (b). In an indictment for bigamy, the venue may

(r) 24 & 25 Vict. c. 96, s. 114.

(s) 7 Geo. 4, c. 64, s. 13; see *Reg. v. Sharpe*, Dears. 415.

(t) 1 Vict. c. 86, s. 37.

(u) 24 & 25 Vict. c. 96, s. 96.

(x) *Id.* s. 114.

(y) 24 & 25 Vict. c. 96, s. 70.

(z) 24 & 25 Vict. c. 96, s. 41.

(a) 24 & 25 Vict. 99, s. 28.

(b) See 2 East, P. C. 1120, 1125; *R. v. Burdett*, 3 B. & Ald. 717; 4 B. & Ald. 95.

be laid either in the county where the offender was apprehended or is in custody (c), or in that in which the second marriage took place; and on an indictment for returning from transportation, or being illegally at large before the expiration of a term of penal servitude, the offender may be tried either in the county whence he was ordered to be transported or kept in penal servitude, or in that where he was apprehended (d).

Lastly, where the court appears by the indictment to have jurisdiction over the offence charged therein, no objection could, since the stat. 7 Geo. 4, c. 64, s. 20, be taken otherwise than by demurrer (e) for the want of a proper or perfect venue; and no indictment is now held to be insufficient on this ground (f), nor need the venue stated in the margin be repeated in the body of the indictment unless where local description is required in setting forth the offence (g).

[* 408] * When the grand jury have heard the evidence, if they think the accusation groundless, they used formerly to indorse on the back of the bill, "*ignoramus*;" or, we know nothing of it; intimating, that though the facts might possibly be true, that truth did not appear to them: but now, they assert in English, more absolutely, "no true bill;" and then the party is discharged without further answer. But a fresh bill may afterwards be preferred to a subsequent grand jury.

If, on the other hand, the grand jury are satisfied of the truth of the accusation, they then indorse upon the bill, "a true bill;" anciently, "*billa vera*." The indictment is then said to be found, and the party stands indicted. But to find a bill there must at least twelve of the jury agree: for so tender is the law of England of the life or liberty of the subject, that no man can be convicted at suit of the crown of any indictable offence, unless by the unanimous voice of twenty-four of his equals and neighbours; that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards, by the whole petit jury, of twelve more, finding him guilty, upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree (h). And the indictment, when found, is publicly delivered into court.

The indictment must have a precise and sufficient certainty (i), and must contain such a description of the crime charged—1st. That the defendant may know what it is that he is called upon to answer; 2ndly. That the jury may appear to be satisfied in their conclusion of "guilty" or "not guilty" upon the premises delivered to them; 3rdly. That the court may see such a definite crime that they may apply to it the punishment which the law prescribes (k).

[* 409] Of these reasons—all weighty and * unanswerable—the first is perhaps the strongest. The convenience of mankind imperatively demands—and in furtherance of that convenience it is part of the duty of those who administer justice to require—that the charge should be specifically set forth in the indictment, in order that notice may thus be given to the accused person of what he is to come prepared to answer, and to prevent his being distracted—amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be impeached (l).

(c) 24 & 25 Vict. c. 100, s. 57; see *R. v. Gordon*, Russ. & Ry. 48.

(d) 5 Geo. 4, c. 84, s. 22; 20 & 21 Vict. c. 8, s. 8.

(e) *Post*, chap. 19.

(f) 14 & 15 Vict. c. 100, s. 24.

(g) *Id.* s. 23.

(h) 2 Hale, P. C. 161.

(i) Co. Litt. 303, a; *R. v. Long*, Rep. 121

(k) *Per* Lord de Grey; *R. v. Horne*, 2 Cowp. 672, 682.

(l) *R. v. Perrott*, 2 M. & S. 386.

The offence itself, whether existing at common law or constituted by statute, must therefore be set forth with clearness and certainty; so that in the one case the essential ingredients in it may be apparent, and in the other the material words used by the legislature in describing it may be exhibited. In setting forth some crimes, moreover, particular words of art must be used, which are so appropriated by our law to express the precise idea which it entertains of the offence charged, that no other words, however synonymous they may seem, are accounted capable of doing it. Thus, in treason, the facts must be laid to be done by the accused "traitorously and against his allegiance;" anciently, "*proditorie et contra ligeantiae suae debitum*;" else the indictment is void. In indictments for murder, it is necessary to say that the party indicted "murdered," not "killed" or "slew," the other; which was formerly expressed in Latin by the word "*murdravit*." In an indictment for felony, the adverb "feloniously," "*felonice*," must be used; and for burglary, also "*burglariter*," or in English, "burglariously;" and these to ascertain the intent. In an indictment for rape, the word "*rapuit*," or "ravished," is necessary, and must not be expressed by any periphrasis; in order to render the crime certain.

So in an indictment for larceny, the words "*felonice cepit et asportavit*," "feloniously took and carried away," are necessary; for these [* 410] only can express the very offence of stealing.

Further, the indictment must state the facts of the crime with as much certainty as the nature of the case will admit (*m*). And the offence charged therein must be positively averred, not stated by way of recital (*n*) or in the disjunctive (*o*). Repugnancy, moreover, in a material matter, may be fatal to the indictment (*p*).

Again, it is a well founded rule that there must be on the face of every indictment a distinct intimation to the person to be tried whether the offence with which he stands charged is a felony or a misdemeanor. The indictment for a felony therefore must allege that the act charged was done "feloniously" (*q*).

Neither should a count for felony be joined with a count for misdemeanor in the indictment; nor should criminal acts separate from each other and distinct in kind though referable, may be, to the same general class of felonies or misdemeanors, be joined in the same indictment (*r*).

A joinder of counts in an indictment may, however, sometimes be proper, and is in certain cases expressly allowed by statute. Thus, in an indictment for larceny, several counts may be inserted for distinct acts of stealing, not exceeding three, which may have been committed by the accused against the same person within the space of *six months from the first to the last of such acts, and the prosecutor may proceed thereon for all or [* 411]

(*m*) *R. v. Holland*, 5 T. R. 611, *et seq.* Therefore, an indictment charging the defendant with obtaining money by false pretences, without stating what were the particular pretences, is insufficient. (*R. v. Mason*, 2 T. R. 581.) There are, however, some exceptions to the above general rule. (*Id.* 585, 586.)

(*n*) *R. v. Crowhurst*, 2 Ld. Raym. 1363.

(*o*) 2 Stra. 901.

(*p*) *R. v. Stevens*, 5 East, 244.

(*q*) *Reg. v. Gray*, L. & C. 365, 371.

(*r*) In the Remarks on the Trial of Stephen Colledge, by Sir John Hawles, Solicitor-General under William III. (8 St. Tr. 729), we read, two capital crimes of different natures, as murder and robbery, or treason and misdemeanor, cannot be joined in one indictment. See *Reg. v. Heywood*, L. & C. 451; *Reg. v. Ferguson*, Dears. 427; *Young v. R.*, 3 T. R. 106, 108.

any of them (s). So a count for feloniously receiving property knowing it to have been stolen, may be joined with a count for stealing the same property (t).

The rule which requires certainty in an indictment having been so strictly applied as often to defeat the ends of justice, some useful statutory provisions have been enacted whereby the frame of the indictment, as well generally as in regard to various specific offences, has been much abbreviated and simplified. No indictment is now held insufficient for want of the averment of matter unnecessary to be proved, nor for the omission of various words and phrases which have usually found place therein, nor for omitting to state the time at which the offence charged was committed, in any case where time is not of the essence of the offence, nor for want of the statement of the value or price of anything or the amount of damage, injury, or spoil in any case where not essential to the constitution of the particular offence (u). Variances between the allegations in the indictment and the proofs adduced at the trial, are, as shown in the next chapter, in many cases amendable, and any objection to the indictment grounded upon defect of form must, if at all, be taken at the proper time (x). In an indictment for murder or manslaughter, or for being an accessory to either of these offences, it is no longer necessary, as formerly, to set forth the manner in which or the means by which the death of the deceased was caused (y), the indictment for felonious homicide (z) thus being [*412] rendered brief and *freed from the possibility of error. And the indictment for each of the following offences:—Stealing any document of title to land (a), or any record or other legal document (b), larceny or embezzlement by any one in her majesty's service, or in the police (c), larceny by a tenant or lodger (d), obtaining any chattel, money, or valuable security by a false pretence (e), and forgery (f), has likewise been materially simplified.

[*413] Such are the several methods of prosecution (g) * instituted by the

(s) 24 & 25 Vict. c. 96, s. 5.

See also s. 6, which applies where a single taking is charged, and several takings at different times are proved.

As to charging distinct acts of embezzlement in the same indictment, *Id.* s. 71.

(t) 24 & 25 Vict. c. 96, s. 92; ss. 93—95.

(u) 14 & 15 Vict. c. 100, s. 24.

(x) *Post*, chap. 19.

(y) 24 & 25 Vict. c. 100, s. 6.

(z) *Ante*, p. 235.

(a) 24 & 25 Vict. c. 96, s. 28.

(b) *Id.* s. 30.

(c) *Id.* ss. 69, 70.

(d) *Id.* s. 74.

(e) *Id.* s. 88.

(f) As regards the description of the instrument forged, see 24 & 25 Vict. c. 98, ss. 42, 43.

(g) Until the stat. 59 Geo. 3, c. 46, another such method existed called an appeal (derived from the French "*appeller*" the verb active, which signifies to call upon, summon, or challenge one; and not the verb neuter, which signifies the same as the ordinary sense of "appeal" in English). An appeal when spoken of as a criminal prosecution, denoted an accusation by one private subject

against another, for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offence against the public.

This private process, for the punishment of public crimes, had probably its origin in those times when a private pecuniary satisfaction, called a *weregild*, was paid to the party injured, or his relations, to expiate any enormous offence. This was a custom derived to us, in common with other northern nations (*Stiernh. de Jure Sueon.* l. 3, c. 4) from our ancestors, the ancient Germans; among whom, according to Tacitus (*De M. G. c. 21*) "*lucit homicidium certo armentorum ac pecorum numero; recipitque satisfactionem universa domus.*" And in another place (c. 12), "*Delictis, pro modo panarum, equorum pecorumque numero convicti mulctantur. Pars mulctæ regi vel civitati; pars ipsi qui vindicatur, vel propinquis ejus, exsolvitur.*" As during the continuance of this custom, a process was certainly given, for recovering the *weregild* by the party to whom it was due; it seems that, when offences by degrees grew no longer redeemable, the private process was still continued, in order to insure the

laws of England for the punishment of offences; of which that by indictment is the most usual. (735)

infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation for the offence.

Although an appeal was thus in the nature of a prosecution for some atrocious injury committed more immediately against an individual, yet was one subject also anciently permitted to appeal another subject of high treason, either in the courts of common law (Britt. c. 22), or in parliament, or (for treasons committed beyond the seas) in the court of the high constable and marshal; and so late as 1681 there was a trial by battle awarded in the court of chivalry, on such an appeal of treason. (By Donald Lord Rea against David Ramsey. (Rushw. vol. 2, pt. 2, p. 112).) The appeal of high treason in the Courts of Common Law was virtually abolished (1 Hale, P. C. 349) by the stats. 5 Edw. 3, c. 9, and 25 Edw. 3, c. 24, and in parliament was expressly abolished by stat. 1 Hen. 4, c. 14. So that the only appeal afterwards in force was in respect of felony and mayhem done within the realm.

An appeal of felony might have been brought for a crime committed either against the party himself, or his relations, *ex. gr.*, for larceny, mayhem, and arson, committed against the party, and for the murder or manslaughter of his relation. But this could not have been brought by every relation: but only by the wife for the death of her husband, or by the heir for the death of his ancestor (Mirr. c. 2, s. 7).

The appeal might have been brought previous to an indictment; and if the appellee were acquitted thereon, he could not have

been afterwards indicted for the same offence.

If moreover the appellee were acquitted, the appellor (by virtue of the stat. of Westm. 2, 13 Edw. 1, c. 12) suffered one year's imprisonment, and paid a fine to the crown, besides restitution of damages to the party for the imprisonment and infamy which he had sustained; and, if the appellor were incapable to make restitution, his abettors were to do it for him, and also were liable to imprisonment. This provision, as was foreseen by the author of Fleta (l. 1, c. 34, s. 48) proved a great discouragement to appeals: so that thenceforward they ceased to be in common use.

If the appellee were found guilty, he suffered the same judgment as if he had been convicted by indictment, but with this remarkable difference; that on an indictment, the crown might pardon and remit the execution; on an appeal, being at the suit of a private subject, to make an atonement for the private wrong, the crown could not pardon it (2 Hawk. P. C. 392). Though the punishment of the offender might be remitted and discharged by the concurrence of all parties interested; and as the crown by pardon might frustrate an indictment, so the appellant by his release might discharge an appeal (1 Hale, P. C. 9), "*nam quilibet potest renunciare juri, pro se introducto.*" This latter kind of appeal was abolished by the 59 Geo. 3, c. 46, the last instance of an appeal of murder having occurred, A.D. 1818 (*Ashton v. Thornton*, 1 B. & Ald. 405).

(735) "An indictment," as defined by Bishop, "is a written accusation, presented on oath by at least twelve of a grand jury, charging a person named therein with a crime which it specifically defines, and returned by the grand jury into court, where it becomes matter of record." 1 Bish. Cr. Proced., § 131. The mode of selecting the grand jurors, their qualifications, etc., are matters which to a great extent are regulated by statutes in the several States of the Union; and, as the statutes differ, those of the particular State should be consulted. The common-law rule that a grand jury for the transaction of business must consist of not over twenty-three persons, and not under twelve, is followed in most of the States. There are, however, exceptions; as to which see *Com. v. Wood*, 2 Cush (Mass.) 149; *State v. Swift*, 14 La. Ann. 827; *People v. Roberts*, 6 Cal. 214; *State v. Hawkins*, 5 Eng. (Ark.) 71; *People v. Thurston*, 5 Cal. 69. At common law more than twelve jurors need not concur in finding the indictment; nor need more than this number be actually present, or even have a nominal existence on the panel. *State v. Clayton*, 11 Rich. (S. C.) 581; *Com. v. Sayers*, 8 Leigh (Va.), 722; *State v. Miller*, 8 Ala. 843; *State v. Symonds*, 36 Me. 128; *Hudson v. State*, 1 Blackf. (Ind.) 817; *Dowling v. State*, 5 Sm. & M. (Miss.) 664; *Norris v. State*, 8 Greene (Iowa), 513.

In the United States courts, and in most of the States, the foreman of the grand jury is selected by the court. In New England it is done by the jury themselves. The oath administered to the foreman is, in most of the States, substantially the same as it is in England. See 1 Whart. Cr. Law, § 466.

Disqualification of grand jurors may be excepted to by two kinds of challenge,—to the array and to the polls. Irregularities in selecting and impaneling the jury, which do not relate to the competency of individual jurors, can generally be objected to only by challenge to the array (*Barney v. State*, 12 Sm. & M. [Miss.] 68; *Vanhook v. State*, 12 Texas, 252);

[*414]

* CHAPTER XIX.

THE TRIAL.

THE proceedings at a criminal trial, which next claim our attention, may be arranged under the following heads, viz.:—I. Process on the indictment; II. Arraignment and its incidents; III. Plea or demurrer; IV. The mode of trial; V. Jury Process; VI. The right of challenge; VII. The production and marshalling of evidence; VIII. The verdict; and IX. The sentence with its concomitants. We shall treat these heads seriatim in the order indicated.

I. The indictment having been found by the grand jury, we are to inquire into the manner of issuing process for bringing in the accused to answer it.

I. Process on Indictment. If, indeed, the offender were in custody before the finding of the indictment, he is immediately (or as soon as convenience permits) to be arraigned thereon. But if he has fled, or secretes himself, or has not been bound over to appear at the assizes or sessions, still an indictment may be preferred against him in his absence: since, were he present, he could not be heard before the grand jury against it. And, if it be found, then process

challenge to the polls is taken in case of some individual disqualification attaching to the particular juror. *Id.*; *Bellair v. State*, 6 Blackf. (Ind.) 104; *Boles v. State*, 24 Miss. 445; *People v. Jewett*, 3 Wend. 314; *State v. Brooks*, 9 Ala. 9.

The grand jury constitute a part of the court, and are under its control. *State v. Cowan*, 1 Head (Tenn.), 280. Thus a grand juror may be punished as for a contempt of court. *State v. Butler*, 8 Yerg. (Tenn.) 83. See *Penn. v. Keffer*, Add. (Penn.) 290. And it has been held a misdemeanor and a high contempt in any individual acting as a volunteer to approach or communicate with the grand jury in reference to any matter which either is or may come before them. *Com. v. Crans*, 3 Penn. Law Jour. 442; 1 Whart. Cr. Law, § 507. A witness subpoenaed to give evidence to the grand jury is directed to appear, not before the grand jury, but before the court. *State v. Butler*, 8 Yerg. (Tenn.) 83. And if such witness is sworn in open court, though not in the immediate presence of the judge, or even in his temporary absence from the bench, it is good. *Jetton v. State*, 1 Meigs (Tenn.), 192; *U. S. v. Reed*, 2 Blatch. C. C. 435. In Connecticut witnesses may, however, be sworn in the grand jury room by a magistrate (*State v. Fissett*, 16 Conn. 457); and in some of the States the witnesses are sworn by the foreman. See *State v. Green*, 24 Ark. 591; *Ayres v. State*, 5 Cold. (Tenn.) 26; *Jillard v. Com.*, 2 Casey (Penn.), 169. It is said that a witness may be indicted for perjury on account of false testimony before a grand jury, and that grand jurors are competent witnesses to prove the facts. See *ante*, note 61. But it seems that an affidavit of a grand juror will not be received to impeach or affect the finding of his fellows (*State v. Baker*, 20 Mo. 338; *State v. Doon*, R. M. Charl. 1; *State v. Beebe*, 17 Minn. 241; *State v. McLeod*, 1 Hawks [N. C.], 344), even for the purpose of showing how many were present when the bill was found, or how many voted in its favor. *People v. Hulbut*, 4 Denio, 133; *State v. Fissett*, 16 Conn. 457; *State v. Oxford*, 30 Texas, 428. But see *Lowe's Case*, 4 Greenl. (Me.) 439.

As it regards a knowledge of the form, structure and material parts of an indictment, recourse must be had to works on criminal law and criminal procedure, which should be consulted in connection with the statutes on the subject of the particular State. An indictment is said to derive its validity from the indorsement of the grand jury "A true bill," over the signature of their foreman. *Keithler v. State*, 10 Sm. & M. (Miss.) 192, 235. And it is not legally essential to the validity of the indictment that it be signed by the public prosecuting attorney (*id.*; *Epps v. State*, 10 Texas, 474; *Ward v. State*, 22 Ala. 16; *Thomas v. State*, 6 Mo. 457), unless made essential by statute, as it is in some of the States. See *Baldwin v. State*, 12 Ind. 383; *Craft v. State*, 3 Kansas, 450; *State v. Salge*, 2 Nev. 321; *State v. Evans*, 8 Humph. (Tenn.) 110; *Teas v. State*, 7 id. 174; *Reynolds v. State*, 11 Texas, 120.

must issue to bring him into court; for the indictment cannot be tried, unless the defendant personally appears: according to the rules of equity in all cases, and the express provision of statute 28 Edw. 3, c. 3, in capital ones, that no man shall be put to death, without being brought to answer by due process of law.

The ordinary method of compelling the appearance of a * defendant against whom an indictment has been found, is now provided by [* 415] the statute 11 & 12 Vict. c. 42, s. 3. It enacts, that where an indictment has thus been found in any court of oyer and terminer or general gaol delivery, or of general or quarter sessions of the peace, against a person still at large, whether such person has been bound by recognizance to appear to answer to the same or not, the clerk of indictments or clerk of the peace, as the case may be, at such court or sessions, shall at any time after the end of the then sessions, upon application of the prosecutor, or on his behalf, if such person shall not have already appeared and pleaded to the indictment, grant to the prosecutor a certificate of such indictment having been found; and upon production of such certificate to a justice of the peace for the county, or place in which the offence is in such indictment alleged to have been committed, or in which the person indicted shall reside or be, or be supposed or suspected to reside or be, such justice shall issue his warrant to apprehend the defendant, and to cause him to be brought before him, to be dealt with according to law. The section further provides that if the defendant be thereupon apprehended and brought before such justice, he shall, upon proof that the person so apprehended is the person charged and named in such indictment, without further inquiry or examination, commit him for trial, or admit him to bail. Provisions are contained in this same statute for the backing of the justice's warrant when necessary (a), and for the detention of the accused until he can be removed by writ of *habeas corpus*, if confined in prison for any offence other than that charged in the indictment at the time of application being made to the justice (b).

Irrespective of the above ordinary procedure, the proper process for compelling the appearance of a defendant against whom an indictment for misdemeanor has been found, is by writ of *venire facias*, which is in the nature * of a summons to cause the party to appear. And if the return to [* 416] such *venire* sets forth that the party has lands in the county whereby he may be distrained, then a distress infinite shall be issued from time to time till he appears. But if the sheriff returns that he has no lands in his bailiwick, then (upon his non-appearance) a writ of *capias ad respondendum* shall issue, which commands the sheriff to take his body, and have him at the next assizes; and if he cannot be taken upon the first *capias*, a second and a third shall issue, called an *alias*, and a *pluries capias*. Though on indictments for treason or felony, a *capias* is the first process.

A bench warrant will also be granted, signed by a judge at the assizes, or by two justices at sessions, to arrest a defendant against whom an indictment for misdemeanor has been found (c). And by the stat. 48 Geo. 3, c. 58, s. 1, when any person is charged with an offence below the degree of felony, a judge may, on an affidavit thereof, or on certificate of an indictment or an information having been filed, issue his warrant for apprehending the defendant and holding him to bail; in default of finding which, he may be committed.

(a) S. 11.
(b) S. 8.

(c) 1 Chitt. Cr. L. 339.

Where the person against whom an indictment, whether for felony or misdemeanor has been found, absconds, or cannot be apprehended by warrant, and it is thought proper to pursue him to outlawry, great exactness is necessary. For, in such case, after the several writs already mentioned have issued in a regular number, according to the nature of the crime, without effect, a writ of exigent will be awarded against the offender in order to his outlawry; that is, he will be exacted, proclaimed, or required to surrender, at five county courts; and if he be returned *quinto exactus*, and does not appear at the fifth exaction or requisition, then he is adjudged to be outlawed, or put out of the protection of the law; so * that he is incapable of taking the benefit of it in any respect, either by bringing a civil action or otherwise.

The punishment for outlawry upon an indictment for a misdemeanor, is the same as for outlawry in a civil action (of which we spoke in the preceding Book (d)); viz., forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by his country (e). His life is, however, still under the protection of the law, as formerly observed (f): so that though anciently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf, by any one who should meet him (g); because, having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him: yet now, to avoid such inhumanity, it has been holden that no man is entitled to kill him wantonly or wilfully; but, in so doing is guilty of murder (h), unless it happens in the endeavour to apprehend him (i). For any person may arrest an outlaw on a criminal prosecution, either of his own head, or by writ of warrant of *capias utlagatum*, in order to bring him to execution. Outlawry may, however, be reversed by writ of error; and the proceedings therein being (as it is fit they should be) exceedingly nice and circumstantial, if any single minute point be omitted or misconducted, the whole outlawry is illegal, and may be reversed: upon which reversal the party accused is admitted to plead to, and defend himself against, the indictment. (736)

Thus much for process to bring in the offender after indictment found; during which stage of the prosecution it is, that the writ of *certiorari facias*, of which we before * spoke (k), is usually had (l), to certify and remove the indictment, with all the proceedings thereon, from an inferior court of criminal jurisdiction into the court of queen's bench; which is the sovereign ordinary court of justice in causes criminal. (737)

Certiorari. [* 418] and remove the indictment, with all the proceedings thereon, from an inferior court of criminal jurisdiction into the court of queen's bench; which is the sovereign ordinary court of justice in causes criminal. (737)

(d) *Ante*, vol. iii.

(e) 2 Hale, P. C. 205.

(f) *Ante*, p. 211.

(g) *Mirr.* c. 4, s. 4; *Co. Litt.* 128.

(h) 1 Hale, P. C. 497.

(i) Bracton, fol. 125.

(k) *Ante*, p. 341.

(l) By stat. 6 Geo. 3 & 1 Will. 4, c. 4, s. 4, the *certiorari* may be applied for before indictment found for a misdemeanor.

(736) Outlawry is unknown in the United States.

(737) As to the form of the writ of *certiorari*, and the course of proceedings under it, see *O'Leary v. People*, 4 Park. 187; *People v. McCormack*, id. 9; *Stephens v. People*, id. 396; *State v. Gustin*, 2 South. (N. J.) 744. The writ is directed to one having the custody or control of the record; and a return by any other person is a nullity. *Com. v. Franklin*, 4 Dall. (Penn.) 316; *State v. Howell*, 4 Zab. (N. J.) 519. The inferior court has no power to decline obedience to the writ. *State v. Hunt*, 1 Cox. (N. J.), 287. A transcript of the record only is sent up; not the record bodily. *Nicholls v. State*, 2 South. (N. J.) 539.

And this is frequently done for one of these four purposes; either, 1. To consider and determine the validity of an indictment and the proceedings thereon; and to quash or confirm them as there is cause: or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at bar, or before the justices of *nisi prius*: or, 3. It is so removed, in order to plead there a pardon from the crown: or, 4. To issue process of outlawry against the offender, in those counties or places where the process of the inferior judges will not reach him (*m*). Such writ of *certiorari*, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the court of queen's bench remands the record to the court below, to be there tried and determined. A *certiorari* may be granted at the instance of either the prosecutor or the defendant; though it is in the discretion of the court to grant or refuse the writ (*n*). Costs, moreover, are now payable by the defendant or the prosecutor in case respectively of conviction or of acquittal incurred subsequent to the removal of the indictment (*o*).

At this stage of prosecution also it is, that an indictment found by the grand jury against a peer must in * consequence of a writ of *certiorari* [* 419] be certified and transmitted into the court of parliament, or into that of the lord high steward of Great Britain (*p*); and that, in places of exclusive jurisdiction, as the two universities, indictments must be delivered (upon challenge and claim of cognizance) to the courts therein established by charter, and confirmed by act of parliament, to be there respectively tried and determined.

II. When the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be arraigned thereon; which II. Arraignment, and its incidents is the fifth stage of criminal jurisdiction.

To arraign (*q*) is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment (*r*). The prisoner is to be called to the bar by his name; and it is laid down in our ancient books (*s*), that he must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured with irons. And although, in *Layer's case*, A.D. 1722, a difference was taken between the time of arraignment, and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment (*t*); and although it has since been held, that the court has no authority to order the irons to be taken off, till the prisoner has pleaded, and the jury are charged to try him (*u*); yet the law upon this point seems to be as first stated.

(*m*) 2 Hale, P. C. 210.

(*n*) 5 & 6 Will. 4, c. 83, s. 1; 5 & 6 Will. & M. c. 11, s. 2; 16 & 17 Vict. c. 80, s. 4, cited *ante*, p. 341; Reg. East. T. 1853.

(*o*) 16 & 17 Vict. c. 80, s. 5; 5 & 6 Will. 4, c. 83, s. 2.

(*p*) *Ante*, p. 336.

(*q*) This word in Latin (Lord Hale says) is no other than *ad rationem ponere*, and in

French, *ad reason*, or abbreviated, *a reem*. 2 Hale, P. C. 216.

(*r*) *Id*.

(*s*) Bract. l. 8, de Coron. c. 18, s. 8; Mirr. c. 5, s. 1, § 54; Flet. l. 1, c. 81, s. 1; Britt. c. 5; Staundf. P. C. 78; 8 Inst. 34. See also 2 Hale, P. C. 219; 2 Hawk. P. C. 806.

(*t*) St. Tr. xvi. 97.

(*u*) *Waite's Case*, Leach, 36.

[* 420] * The prisoner when brought to the bar was formerly called upon by name to hold up his hand: which, though apparently a trifling circumstance, was of this significance, that by holding up his hand *constitit de personâ*, and the prisoner owned himself to be of that name by which he was called (x). However, this was not an indispensable ceremony, and is now disused. The indictment is, however, to be read to the prisoner distinctly in the English tongue (which was law, even while all other proceedings were in Latin), that he may fully understand the charge against him. After which it is to be demanded of him, whether he be guilty of the crime whereof he stands indicted, or not guilty. (738)

When a prisoner is arraigned, he either, 1. Stands mute; or, 2. Confesses the fact; which circumstances we may call incidents to the arraignment; or else, 3. he pleads to the indictment, which is to be considered as another stage of the proceedings. But, first, let us observe these incidents to the arraignment, of standing mute, or confession.

1. Regularly a prisoner is said to stand mute, when, being arraigned, he either (1.) Makes no answer at all; or (2.) Answers foreign to the purpose, or with such matter as is not allowable; and will not answer otherwise.

If the prisoner says nothing, the court ought forthwith to impanel a jury to inquire, 1st, whether the prisoner be mute of malice, or by the visitation of God; if the latter, then 2ndly, whether he is able to plead; and lastly, whether he is sane or not; on which issue the question is, whether he is of sufficient intellect to comprehend the course of the proceedings on the trial, so as to be able to make a proper defence (y).

[* 421] Formerly if the accused were found to be obstinately * mute (which a prisoner was held to be who had cut out his tongue (z)), then, on an indictment of high treason, such standing mute was equivalent to a conviction, and was followed by the same judgment and execution (a). And as in this the highest crime, so also in the lowest species of felony, viz. petty larceny, and in all misdemeanors, standing mute was always equivalent to conviction. But upon indictments for other felonies, the prisoner was not, by the ancient law, looked upon as convicted, so as to receive judgment for the felony; but should, for this obstinacy, have received the terrible sentence of "penance," or *peine* (which, as will appear presently, was probably nothing more than a corrupted abbreviation of *prisonne*) *forte et dure*.

Before this was pronounced the prisoner had not only *trina admonitio*, but also a respite of a few hours, and the sentence was distinctly read to him, that

(x) 2 Hale, P. C. 219.

(y) See *Reg. v. Pritchard*, 7 C. & P. 303, 305, n. As to the course to be taken where

the prisoner is deaf and dumb, but can read, see *R. v. Thompson*, 2 Lewin, C. C. 137.

(z) 3 Inst. 176.

(a) 1 Hawk. P. C. 329; 2 Hale, P. C. 317.

(738) The prisoner may, with the consent of the court, waive the reading of the indictment; and if, after such waiver, he pleads to the indictment, it will be deemed equivalent to a formal arraignment and plea. *Goodin v. State*, 16 Ohic St. 344. See *Washburn v. People*, 10 Mich. 372; 1 Bish. Cr. Proc., § 733.

In Pennsylvania, by statute, arraignment is only required in cases triable exclusively inoyer and terminer. But in such cases it is obligatory. *Dougherty v. Com.*, 69 Penn. St. 286.

he might know his danger (*b*); and, after all, if he continued obstinate, and his offence was clergyable, he had the benefit of his clergy (*c*) allowed him, even though he was too stubborn to pray it (*d*). Thus tender was the law of inflicting this dreadful punishment; but if no other means could prevail, and the prisoner (when charged with a capital felony) continued stubbornly mute, the judgment was then given against him without any distinction of sex or degree. A judgment, which was purposely ordained to be exquisitely severe, that it might rarely be put in execution. (739)

The rack, or question, to extort a confession from criminals, is a practice, different in its nature from the *peine forte et dure*; this having been only used to compel a man to put himself upon his trial; that being a species of trial in itself. And the trial by rack is utterly unknown * to the law of [* 422] England; though once, when the dukes of Exeter and Suffolk, and other ministers of Henry VI. had laid a design to introduce the civil law into this kingdom as the rule of government, for a beginning thereof they erected a rack for torture; which was called in derision the duke of Exeter's daughter, and still remains in the tower of London (*e*); where it was occasionally used as an engine of state, not of law, more than once in the reign of queen Elizabeth (*f*). But when, upon the assassination of Villiers, duke of Buckingham, by Felton, it was proposed in the privy council to put the assassin to the rack, in order to discover his accomplices; the judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England (*g*). Though doubtless, torture was afterwards applied to state criminals on more than one occasion during the reign of Charles I. (*h*).

It seems astonishing that this usage of administering the torture, should be said to arise from a tenderness to the lives of men: and yet such is the reason given for its introduction in the civil law (*i*); viz. because the laws cannot endure that any man should die upon the evidence of a false, or even a single witness; and therefore contrived this method that innocence should manifest itself by a stout denial, or guilt by a plain confession. Thus rating a man's virtue by the hardness of his constitution, and his guilt by the sensibility of his nerves. But we need only state accurately, in order effectually to expose this inhuman species of mercy, the uncertainty of which, as a test and criterion of truth, was long ago pointed out by one who lived in a community where it was usual to * torture slaves in order to furnish evidence: "*tamen*," [* 423] says he, "*illa tormenta gubernat dolor, moderatur natura cujusque tum animi tum corporis, regit quæsitior, fleclit libido, corrumpit spes, infirmat metus, ut in tot rerum angustiis nihil veritati loci relinquatur* (*k*).

The English judgment of penance for standing mute (*l*) was as follows: that the prisoner be remanded to the prison from whence he came; and put into a

(*b*) 2 Hale, P. C. 320.

(*c*) *Post*.

(*d*) 2 Hale, P. C. 321; 2 Hawk. P. C. 332.

(*e*) 8 Inst. 35.

(*f*) Barr. 69, 885.

(*g*) Rushw. Coll. 1. 638.

(*h*) See Mr. Jardine's "Reading on the Use of Torture in England."

(*i*) Cod. 1. 9, t. 41, l. 8, & t. 47, l. 16; Fortesq. de Leg. Ang. c. 22.

(*k*) Cic. Pro Sulla, 28.

(*l*) 2 Hale, P. C. 319; 2 Hawk. P. C. 329.

(739) The only recorded American case in which the punishment described in the text was inflicted, was that of *Giles Corey*, 2 Hildreth's U. S. Hist. 160; 3 Bancroft's U. S. Hist. 98.

low, dark chamber; and there be laid on his back, on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of iron as he could bear, and more: that he have no sustenance, save only, on the first day, three morsels of the worst bread; and, on the second day, three draughts of standing water, that he should be nearest to the prison door; and in this situation such should be alternately his daily diet till he died, or (as anciently the judgment ran) till he answered (*m*).

It has been doubted whether this punishment subsisted at the common law (*n*), or was introduced in consequence of the statute Westm. 1, 3 Edw. 1, c. 12 (*o*), which seems to be the better opinion. And, at all events, the uncertainty of its origin, the doubts that were conceived of its legality, and the repugnance of its theory (for it rarely was carried into practice) to the humanity of the laws of England, all concurred to require a legislative abolition of this cruel process, and a restitution of the ancient common law; whereby the standing mute in felony, as well as in treason and in trespass, amounted to a confession of the charge. If, indeed, the corruption of the blood and the consequent escheat in felony had been removed, the judgment of *peine forte et dure* might perhaps have still innocently remained, as a monument of the savage rapacity with which the lordly tyrants of feudal [* 424] antiquity hunted after * escheats and forfeitures; since no one would ever have been tempted to undergo such a horrid alternative. For the law was, that by standing mute, and suffering this heavy penance, the judgment, and of course the corruption of the blood and escheat of the lands, were saved in felony, though not the forfeiture of the goods: and therefore this lingering punishment was probably introduced in order to extort a plea: without which it was held that no judgment of death could be given, and so the lord lost his escheat. But in high treason, as standing mute is equivalent to a conviction, the same judgment, the same corruption of blood, and the same forfeitures always attended it, as in other cases of conviction (*p*). And, to the honour of our laws, it was enacted by statute 12 Geo. 3, c. 20, that every person who, being arraigned for felony or piracy, shall stand mute or not answer directly to the offence, shall be convicted of the same; and the same judgment and execution (with all their consequences in every respect) shall be thereupon awarded, as if the person had been convicted by verdict or confession of the crime; and now, by the 7 & 8 Geo. 4, c. 28, s. 2, whenever the prisoner, on his arraignment for any treason, felony, piracy, or misdemeanor, stands mute of malice, or will not answer directly to the charge, a plea of not guilty may be (and always is) entered for him by order of the court, and the plea so entered has the same effect as if the prisoner had actually pleaded it.

And thus much for the demeanor of a prisoner upon his arraignment.

2. The other incident to arraignment, exclusive of the plea, is the prisoner's actual confession of the indictment. Upon a simple and plain confession, the court has nothing to do but to award judgment: but it is usually
2. Confession. very backward in receiving and recording such confession, out of

(*m*) Britton, co. 4 & 22; Flet. 1. 1, t. 84, s. 83.

(*n*) 2 Inst. 179; 2 Hale, P. C. 522; 2 Hawk. P. C. 330.

(*o*) Staundf. P. C. 149; Barr. 65.

(*p*) 2 Hawk. P. C. 581.

tenderness to the life of the subject: and will generally *advise the prisoner to retract it, and plead to the indictment (q). (740) [* 425]

III. We are now to consider the plea of demurrer of the prisoner, that is the defensive matter alleged by him on his arraignment, if he does not confess or stand mute. This is either, 1. A plea to the jurisdiction; 2. A plea in abatement; 3. A demurrer; 4. A special plea in bar; or, 5. The general issue.

Formerly indeed, there was another plea, now abrogated, that of sanctuary; a brief reference to which may throw some light upon parts of our ancient law: it having been introduced and continued during the superstitious veneration that was paid to consecrate the ground in the times of popery. First then, it is to be observed, that if a person accused of any crime (except treason, wherein the crown, and sacrilege, wherein the church, was too nearly concerned) had fled to any church or churchyard, and within forty days after went in sackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence; and thereupon took the oath in that case provided, viz. that he abjured the realm, and would depart from thence forthwith at the port that should be assigned him, and would never return without leave from the crown; he by this means saved his life, if he observed the conditions of the oath, by going, with a cross in his hand and with all convenient speed, to the port assigned, and embarking. For if, during this forty days privilege of sanctuary, or in his road to the sea-side, the accused person was apprehended and arraigned in any court for this felony, he might plead the privilege of sanctuary, and had a right to be remanded, if taken out against his will (r). But by this abjuration his blood was attainted, and he forfeited all his goods and chattels (s). The *immunity of these privileged places was very much abridged by the statutes 27 Hen. 8, c. 19, and 32 Hen. 8, c. 12. And by the statute 21 Jac. 1, c. 28, all privilege of sanctuary, and abjuration consequent thereupon, was utterly taken away and abolished. [* 426]

Formerly also the benefit of clergy was sometimes pleaded before trial or conviction, and was called a declinatory plea; which was the name also given to that of sanctuary (t). As to the benefit of clergy, though now abolished, somewhat will be said hereafter.

I proceed, therefore, to some brief consideration of each of the five heads before mentioned.

1. A plea to the jurisdiction is where an indictment is taken before a court, which has no cognizance of the offence; as if a man be indicted for a rape at the sheriff's tourn, or for treason at the quarter sessions: in these or similar cases, he may except to the jurisdiction of the court, or

(q) 2 Hale, P. C. 225.

(r) Mirr. c. 1, s. 18; 2 Hawk. P. C. 885.

(s) 2 Hawk. P. C. 52.

(t) 2 Hale, P. C. 246.

(740) The plea of "guilty" confesses no offense where the indictment is insufficient, and contains no valid charge of an offense. *Fletcher v. State*, 7 Eng. (Ark.) 169. See *McCaulley v. U. S.*, Morris, 486.

This plea should be made by the defendant personally. *People v. McCrary*, 41 Cal. 459. See *McQuillan v. State*, 8 Sm. & M. (Miss.) 587.

without answering to the crime alleged (x). In some cases also the defendant may take advantage of the want of jurisdiction under the plea of not guilty; as where the objection proves that no court in England can try the indictment (y). And an objection to the jurisdiction, apparent on the face of the proceedings, may be taken advantage of on demurrer (z). (741)

2. A plea in abatement is now of rare occurrence in criminal procedure. Formerly such a plea was principally for a misnomer, a wrong name, or a false addition (a) to the prisoner. As, if "James" Allen, "gentleman," were indicted by the name of "John" Allen, "esquire," he might have pleaded that he had the name of James, and not of John; and that he was a gentleman, and not an esquire. And, if either fact were found by a jury, then the indictment was abated. But, in the end, there was little advantage accruing to the prisoner by means of * this dilatory plea: because, [* 427] if the exception were allowed, a new bill of indictment might have been framed, according to what the prisoner in his plea averred to be his true name and addition. For it was a rule, upon all pleas in abatement, that he, who took advantage of a flaw, must at the same time show how it might be amended. Moreover, the stat. 7 Geo. 4, c. 64, s. 19, enabled the court, if satisfied by affidavit or otherwise of the truth of a plea of misnomer, or want of addition, or wrong addition, forthwith to amend the indictment and call upon the party to plead as if no such dilatory plea had been pleaded. And now, by 14 & 15 Vict. c. 100, s. 24, no indictment for any offence shall be held insufficient "for want of or imperfection in the addition" of a defendant, and by s. 1 of this statute, whenever on the trial of any indictment for felony or misdemeanor there shall appear to be any variance between the statement in the indictment and the evidence offered in proof thereof, in (amongst other things) "the Christian name or surname, or both Christian name and surname, or other description whatsoever of any person or persons whomsoever therein named or described," the court is empowered if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order the indictment to be amended. Judgment for the crown upon a plea in abatement if the indictment be for a misdemeanor is final, in treason or felony it is that the defendant do answer over (b).

3. A demurrer to the indictment is incident to a criminal as well as to a civil case, when the fact as alleged is allowed to be true, but the prisoner joins
 3. Demurrer. issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be. A demurrer however is now in practice unusual, [* 428] because, although the various defects * or omissions specified in the 7 Geo. 4, c. 64, s. 20 (c), were fatal if thus taken, but were cured by

(x) Ibid. 256.

(y) *R. v. Johnson*, 6 East, 583.

(z) *R. v. Fearnley*, 1 T. R. 316.

(a) See stat. 1 Hen. 5, c. 5.

(b) *R. v. Gibson*, 8 East, 107.

(c) See also s. 21.

(741) Pleas to the jurisdiction are of comparatively rare occurrence; the easier and simpler course being a writ or error or a motion in arrest of judgment. See *Com. v. Gillespie*, 7 Serg. & R. (Penn.) 489; *Adams v. People*, 1 N. Y. (1 Comst.) 173; S. C., 8 Denio, 190.

pleading over, the statute 14 & 15 Vict. c. 100, ss. 24 & 25 (*d*), has rendered such and some other imperfections amendable and immaterial.

For the defendant judgment upon demurrer is given generally in his favour—for the crown the judgment upon a general demurrer to an indictment for felony is final (*e*), and judgment upon demurrer to an indictment for misdemeanor is, unless leave be given by the court to plead over, likewise final (*f*). (742)

Let us next consider a more substantial kind of plea, viz.—4. A special plea in bar; which goes to the merits of the indictment, and gives a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. Special pleas are principally of three kinds (*g*): (1.) A former acquittal; (2.) A former conviction; or (3.) A pardon.

(1.) The plea of *autrefois acquit* (*h*) or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy, more than once, for the same offence (*i*).

(1.) *Autrefois acquit.* And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon an indictment, or other prosecution, before any court having competent jurisdiction of the offence (*k*), he may plead such acquittal in bar of any subsequent accusation for the same crime, provided that the previous indictment were one upon which the *defendant [*429] could legally have been convicted; upon which his life or liberty was not merely imaginary, but in actual danger; and, consequently, in which there was no material error (*l*). The test accordingly for determining whether a plea of *autrefois acquit* would be proper, appears to be this—would the evidence necessary to support the second indictment have been sufficient to procure a legal conviction upon the first (*m*)?

Besides pleading *autrefois acquit*, the defendant should also in felony or treason, at the same time, plead over to the indictment.

(2.) The plea of *autrefois convict* (*n*), or a former conviction for the same identical crime, is a good plea in bar to an indictment. And this depends

(*d*) See also s. 1.

(*e*) *Reg. v. Fuderman*, 1 Den. C. C. 569.

(*f*) *R. v. Taylor*, 8 B. & C. 502; *Reg. v. Birmingham & Gloucester R. Co.*, 8 Q. B. 224.

(*g*) On an indictment against a parish or county for not repairing a road or bridge, a special plea in bar to throw the onus of repairing upon some person not bound of common right to repair it, may be necessary.

(*h*) As to the form of which, see 14 & 15 Vict. c. 100, s. 28, and as to the mode of

proving such a plea, see 14 & 15 Vict. c. 99, s. 18.

(*i*) 2 Hawk. P. C. chap. 23.

(*k*) 8 Mod. 194.

(*l*) 2 Hale, P. C. 248; Hawk. b. 2, c. 85, s. 8; *R. v. Taylor*, 8 B. & Cr. 507; *R. v. Clark*, 1 Brod. & B. 478.

(*m*) See *Reg. v. Knight*, L. & C. 878.

(*n*) As to the form of which, see 14 & 15 Vict. c. 100, s. 28, and as to the mode of proving such a plea, see 14 & 15 Vict. c. 99, s. 18.

(742) The rule in the United States is stated to be that if there is a demurrer to an indictment for a misdemeanor, and it is overruled, the judgment, unless the demurrer is permitted to be withdrawn, is final against the defendant. *Com. v. Eastman*, 1 Cush. (Mass.) 189, 192; *State v. Rutledge*, 8 Humph. (Tenn.) 32; *People v. Taylor*, 8 Denio, 91; *Com. v. Foggy*, 6 Leigh (Va.), 638. But see *McCuen v. State*, 19 Ark. 630; *State v. Wilkins*, 17 Vt. 151. In felonies the judgment is that the defendant answer over. *State v. Merrill*, 37 Me. 329; 1 Bish. Cr. Proced., § 784.

As to the rule in Missouri, see *Lewis v. State*, 11 Mo. 866; *Maeder v. State*, id. 863; *Thomas v. State*, 6 id. 457; *Ross v. State*, 9 id. 687. And see, generally, *People v. Apple*, 7 Cal. 289; *Wise v. State*, 24 Ga. 31; *Cowman v. State*, 12 Md. 250.

(2.) *Autrefois convict*, upon the same principle as the former, that no man ought to be twice brought in danger of punishment for one and the same crime (o). Hereupon it has been held, that a conviction of manslaughter, on an indictment, is a bar to another indictment for murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree. It is to be observed, that the pleas of *autrefois acquit*, and *autrefois convict*, or a former acquittal, and former conviction, are appropriate only where there has been a former judicial decision on the same accusation in substance, and where the question in dispute has been already decided (p). (743)

(3.) A pardon may be pleaded in bar (q); as at once destroying the end and

(o) 2 Hawk. P. C. 377.

Of the same nature with the pleas of *autrefois acquit* and *autrefois convict* seems to be the plea, to an indictment for assault, that the fact has been adjudicated on by two justices, *ante*, pp. 247-9.

(p) *Reg. v. Morris*, 1 C. L. R. (C. C.) 90, 94.

(q) The plea of *autrefois attain* was formerly a good plea in bar, whether it were for the same or any other felony (2 Hawk. P. C. 375), because, generally, such proceeding on a second prosecution could not be to any pur-

pose: for the prisoner was dead in law by the first attainder, his blood was corrupted, and all that he had was forfeited: so that it was absurd and superfluous to endeavour to attain him a second time. Now, however, by the stat. 7 & 8 Geo. 4, c. 28, s. 4, a plea setting forth an attainder shall not be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment; and hereby the plea of *autrefois attain* has been practically abrogated.

(743) In the United States the most important of special pleas are those of *autrefois convict*, *autrefois acquit*, and *once in jeopardy*. The forms of the pleadings have been much simplified by statute in many of the States, and the statutes of the particular State should be consulted.

Nothing short of a record of acquittal will sustain the plea of *autrefois acquit*. *Bailey v. State*, 28 Ga. 579. But an acquittal without the judgment of the court thereon is held a bar (*West v. State*, 2 Zabr. [N. J.] 212); and to sustain the plea of *autrefois convict*, it is not necessary that judgment be pronounced on the verdict. *State v. Elden*, 41 Me. 165, 170. See *State v. Mount*, 14 Ohio, 295; *Brennan v. People*, 15 Ill. 511; *Penn. v. Huffman*, Addison (Penn.), 140; *State v. Norvell*, 2 Yerg. (Tenn.) 24; *Preston v. State*, 25 Miss. 383; *Ratzky v. People*, 29 N. Y. (2 Tiff.) 124; *Gardiner v. People*, 6 Park. 155.

A former conviction or acquittal procured by the fraud of the defendant is no bar to a subsequent prosecution. *State v. Green*, 16 Iowa, 239; *State v. Cole*, 48 Mo. 70; *State v. Little*, 1 N. H. 268; *Com. v. Alderman*, 4 Mass. 477; *State v. Brown*, 16 Conn. 54; *Com. v. Jackson*, 2 Va. Cas. 501. So an acquittal on a defective or inadequate indictment is no bar. *Mumford v. State*, 39 Miss. 558; *Black v. State*, 36 Ga. 447; *People v. Barrett*, 1 Johns. 96; *Com. v. Somerville*, 1 Va. Cas. 164. But otherwise as to a conviction on such an indictment. *Com. v. Keith*, 3 Metc. (Mass.) 531; *Com. v. Loud*, *id.* 328.

In pleading *autrefois acquit* or *convict*, the prisoner must be prepared to prove on the spot the truth of his plea by the record, which he must have in court, and vouch in support of his plea; and if this proof be not instantly given the court will overrule the plea; although, for good cause shown, it will give time to plead until the record can be procured. *Com. v. Myers*, 1 Va. Cas. 188, 232. If such plea is tendered by the prisoner, and the attorney for the Commonwealth demurs to it, this is an admission that the record of acquittal or conviction was produced as it ought to have been. *Id.*

When the plea of *autrefois acquit* or *convict* is determined against the defendant, he is, in most cases, allowed to plead over, and to have his trial for the offense itself. *Foster v. Com.*, 8 Watts & S. (Penn.) 77; *Barge v. Com.*, 8 Penrose & W. (Penn.) 262; *Com. v. Goddard*, 13 Mass. 455; *Hirn v. State*, 1 Ohio St. 16.

The plea of "*once in jeopardy*" is proper in certain cases, to which the plea of *autrefois acquit* or *convict* is not adapted. Thus it has been held that where a jury in a capital case have been discharged without consent before verdict, after having been sworn and charged with the offense, the defendant, under certain limitations, may bar a second prosecution by a special plea setting forth the fact that his life has already been put in jeopardy for the same offense. *Ned v. State*, 7 Port. (Ala.) 187; *Williams' Case*, 2 Gratt. (Va.) 567; *Com. v.*

(3.) Pardon. purpose of the indictment, by * remitting that punishment which the prosecution is calculated to inflict. [* 430]

There is one advantage that attends pleading a pardon in bar, or in arrest of judgment, before sentence is past, which gives it by much the preference to pleading it after sentence or attainder. This is, that by stopping the judgment it stops the attainder, and prevents the corruption of blood; which, when once corrupted by attainder, cannot afterwards be restored, otherwise than by act of parliament. But as the title of "pardon" is applicable to other stages of prosecution; and it may have its peculiar force and efficacy, as well after as before conviction, outlawry, or attainder; the more minute consideration of this will be reserved till some other titles have been gone through (r).

5. It remains that I consider the general issue, or plea of "not guilty." In case of an indictment of felony or treason, there can be no special justification put in by way of plea. Thus, on an indictment for murder, 5. Plea of not guilty. a man cannot plead that it was done in his own defence against a robber on the highway, or a burglar; but he must plead the general issue, not guilty, and give this special matter in evidence. And as the facts in treason are laid to be done *proditorie et contra ligeantiam suam debitum*, and in felony, the killing is laid to be done *felonice*; these charges, of a traitorous or felonious intent, are the points and very gist of the indictment, and must be answered directly, by the general negative, not guilty; and the jury upon the *evidence will take notice of any defensive matter, and [* 431] give their verdict accordingly, as effectually as if it were, or could be, specially pleaded. So that this is, upon all accounts, the most advantageous plea for the prisoner (s).

In the case of an indictment for a misdemeanor, however, the above rule, as to pleading the general issue, does not apply with the same degree of strictness; for there are some cases where a special plea is not only allowable, but even requisite. Thus, if the defendant fall within any exception or proviso, which is not contained in the purview of the statute or clause creating the offence, he may, by pleading, show that he is entitled to the benefit of that exception or proviso; and there are many pleas of this description in the ancient entries (t). But the principal, and indeed almost the only case, in which a special plea to the merits may be necessary, is where an indictment has been brought for neglecting to repair a highway or a bridge (u).

By the plea of "not guilty" a defendant not having privilege of peerage is now deemed to have put himself upon the country for trial (x), and various formalities, which were formerly observed subsequent to this plea, have fallen into disuse (y). (744)

(r) *Post*, chap. xx.

(s) 2 Hale, P. C. 258.

(t) 2 Leach, 606.

(u) *Ante*, p. 196.

(x) 7 & 8 Geo. 4, c. 28, s. 1.

(y) The prisoner's plea of "not guilty," *non culpabilis* or *nient culpable*, was formerly abbreviated upon the minutes, thus "*non* (or

Cook, 6 Serg. & R. 577; *Com. v. Glus*, 3 Rawle (Penn.), 498; *Spiera's Case*, 1 Dev. (N. C.) 491; *State v. Garrigue*, 1 Hayw. (N. C.) 241. See *McCauley v. State*, 26 Ala. 135; *Reese v. State*, 8 Ind. 416; *People v. Barrett*, 2 Caines, 304. And see this subject fully discussed, 1 Whart. Cr. Law, §§ 573 to 590.

(744) It is in the discretion of the court to allow the plea of guilty to be withdrawn, and a plea of not guilty to be entered in its stead; and this has been allowed even after the overruling of a motion in arrest of judgment. *State v. Cotton*, 4 Fost. (N. H.) 143. See

IV. The modes of trial and conviction of offenders, established by the laws of England, were formerly more * numerous than at present, through the superstition of our Saxon ancestors: who, like other northern nations, were extremely addicted to divination; a character which Tacitus observes of the ancient Germans (z). They therefore invented various methods of purgation or trial, to preserve innocence from the danger of false witnesses, and in consequence of a notion that God would interpose miraculously to vindicate the guiltless.

1. A very ancient (a) species of trial was that by ordeal, designated *judicium Dei*; and sometimes *vulgaris purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party. This was of two sorts (b), either fire-ordeal, or water-ordeal; the former being confined to persons of higher rank, the latter to the common people (c). Both these might be performed by deputy, but the principal was to answer for the success of the trial; the deputy only venturing some corporal pain, for hire, or perhaps for friendship (d). Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red-hot iron, of one, two, or three pounds weight: or else by walking, barefoot and blindfold, over nine red-hot ploughshares, laid lengthwise at unequal distances: and if the party escaped being hurt, he was adjudged innocent; but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty. However, by this latter method queen Emma, the mother of Edward the Confessor, is mentioned to have cleared her character, when suspected of familiarity with Alwyn, bishop of Winchester (e).

nient) cul.," and to it the clerk of the assize, or clerk of the arraigns, on behalf of the crown replied, that the prisoner was guilty, and that the crown was ready to prove him so. This was done by two monosyllables, "cul. prit.," signifying first that the prisoner was guilty (*cul. culpable, or culpabilis*), and then that the crown was ready to prove him so; *prit.*, i. e., *præsto sum, or paratus verificare*, this being a replication on behalf of the crown made *viâ voce* at the bar. Hence a possible derivation of the word "culprit."

(z) De Mor. Germ. 10.

(a) Jacob, L. Dict. tit. "Ordeal."

(b) Mirr. c. 8, s. 23.

(c) *Tenetur se purgare is qui accusatur, per Dei judicium; scilicet, per calidum ferrum, vel per aquam, pro diversitate conditionis hominum; per ferrum calidum si fuerit homo liber; per aquam, si fuerit rusticus.* Glanv. l. 14, c. 1.

(d) This is still expressed in the form of speech, "going through fire and water to serve another."

(e) Tho. Rudborne, Hist. Maj. Winton, l. 4, c. 1.

State v. Salge, 2 Nev. 321. Where there are more defendants than one, each of these may plead severally not guilty; but a general plea of not guilty is, in law, the several plea of each. *State v. Smith*, 2 Ired. (N. C.) 403.

There can be no trial on the merits in a criminal case, until the defendant has pleaded not guilty (*Sartorius v. State*, 24 Miss. 602); or this plea has been entered for him; which is permitted to be done by statute in each of the United States whenever the prisoner stands mute, and the trial proceeds as if he had regularly pleaded not guilty in person. See *U. S. v. Hare*, 2 Wheel. C. C. 299. In a proper case the plea of not guilty may be withdrawn by leave of court, preparatory to entering a plea of guilty, or to some other proceeding. *Davis v. State*, 20 Ga. 674; *State v. Abrahams*, 6 Iowa, 117.

The plea of *nolo contendere*, though not common, is sometimes allowed in misdemeanors. So far as regards the proceedings on the indictment it has the same effect as a plea of guilty. But a plea of *nolo contendere*, with a protestation of the defendant's innocence, will not conclude him in a civil action from disputing the facts charged in the indictment. *Com. v. Horton*, 9 Pick. (Mass.) 206; *Com. v. Tilton*, 8 Metc. (Mass.) 232. See *Com. v. Adams*, 6 Gray (Mass.), 359; *Birchard v. Booth*, 4 Wis. 67.

Water-ordeal was performed, either by plunging the *bare arm up to the elbow in boiling water, and escaping unhurt thereby: or by being [* 433] cast into a river or pond of cold water; and, if the suspected person floated therein without any action of swimming, it was deemed an evidence of his guilt; but, if he sunk, he was acquitted. It is easy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity formerly practised to discover witches by casting them into a pool of water, and drowning them to prove their innocence. And in the Eastern empire the fire-ordeal was used to the same purpose by the Emperor Theodore Lascaris; who, attributing his sickness to magic, caused all those whom he suspected to handle the hot iron: thus joining (as has been well remarked (*f*)) to the most dubious crime in the world, the most dubious proof of innocence.

This purgation by ordeal was known to the ancient Greeks; for in the *Antigone* of Sophocles (*g*), a person, suspected by Creon of a misdemeanor, declares himself ready "to handle hot iron, and to walk over fire," in order to manifest his innocence; which, the scholiast tells us, was then a very usual purgation. And Grotius (*h*) gives us instances of water-ordeal in Bithynia, Sardinia, and other places.

One cannot but be astonished at the folly and impiety of pronouncing a man guilty, unless he was cleared by a miracle; and of expecting that all the powers of nature should be suspended by an immediate interposition of Providence to save the innocent, whenever it was presumptuously required. And yet in England, so late as king John's time, we find grants to the bishops and clergy to use the *judicium ferri, aquæ et ignis* (*i*). And, both in England and Sweden, the clergy presided at this trial, and it was only performed in the churches or in other consecrated *ground: for which Stiernhook (*k*) [* 434] gives the reason; "*non defuit illis operæ et laboris pretium; semper enim ab ejusmodi judicio aliquid lucri sacerdotibus obveniebat.*" But, to give it its due praise, we find the canon law very early declaring against trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, "*cum sit contra preceptum Domini, non tentabis Dominum Deum tuum* (*l*). Upon this authority, though the canons themselves were of no validity in England, it was thought proper to disuse and abolish this trial entirely in our courts of justice, by an act of parliament in 3 Hen. III. according to sir Edward Coke (*m*), or rather by an order of the king in council (*n*).

2. Another species of purgation, somewhat similar to the former, but probably sprung from a presumptuous abuse of revelation in the ages of dark superstition, was the corsned, or morsel of execration: being a
 3. Trial by the corsned. piece of cheese or bread, of about an ounce in weight, which was consecrated with a form of exorcism; desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty; but might turn to health and nourishment, if he was innocent (*o*); as the water of jealousy among the Jews (*p*) was, by God's special appointment, to cause the belly to swell, and the thigh to rot, if the woman was guilty of

(*f*) Montesquieu, Sp. L. b. 12, c. 5.

(*g*) V. 270.

(*h*) On Numb. v. 17.

(*i*) Spelm. Gloss. 435.

(*k*) De Jure Sueonum, l. 1, c. 8.

(*l*) Decret. pt. 2, caus. 2, qu. 5, dist. 7; Decretal. lib. 3, tit. 50, c. 9, & Gloss. *ib*.

(*m*) 9 Rep. 82.

(*n*) 1 Rym. Fœd. 228; Spelm. Gloss. 326; 2 Pryn. Rec. Append. 20; Seld. Eadm. fol. 48.

(*o*) Spelm. Gl. 439.

(*p*) Numb. chap. v.

adultery. This corsned was then given to the suspected person; who at the same time also received the holy sacrament (*q*): if indeed the corsned was not, as some have suspected, the sacramental bread itself; till the subsequent invention of transubstantiation preserved it from profane uses with a more profound respect than formerly. Our historians assure us, that Godwin, earl of Kent, [** 435*] in the reign of king * Edward the Confessor, adjuring the death of the king's brother, at last appealed to his corsned, "*per buccellam deglutiendam abjuravit*" (*r*), which stuck in his throat and killed him. This custom has been long since gradually abolished, though the remembrance of it still subsists in certain phrases of adjuration retained among the common people (*s*). These two antiquated methods of trial were principally in use among our Saxon ancestors. The next, which remained in force till much more recently, owed its introduction among us to the princes of the Norman line. And that is,

3. The trial by battle, duel, or single combat; which was another species of presumptuous appeal to Providence, under an expectation that Heaven would give victory to the innocent or injured party. The nature of this trial in cases of civil injury, upon issue joined in a writ of right, was discussed in the preceding volume (*t*); to what was there said I have only to add, that the trial by battle might have been demanded at the election of the appellee, in either an appeal (*u*) or an approvement (*x*); and that it was carried on with equal solemnity as on a writ of right: but with this difference, that there each party might have hired a champion, but here he was bound to fight in his proper person (*y*).

[** 436*] The form and manner of waging battle upon an appeal * were much the same as upon a writ of right; only the oaths of the two combatants were more striking and solemn (*a*). The appellee, when appealed of felony, pleaded "not guilty," and throwing down his glove, declared he would defend the same by his body: the appellant, taking up the glove, replied that he was ready to make good the appeal, body for body. Thereupon the appellee, taking the book in his right hand, and in his left the right hand of his antagonist, made an oath to this effect: "*Hoc audi, homo, quem per manum teneo,*" &c. "Hear this, O man, whom I hold by the hand, who callest thyself John by the name of baptism, that I, who call myself Thomas by the name of baptism, did not feloniously murder thy father, William by name, nor am any way guilty of the said felony. So help me God, and the saints; and this I will defend against thee by my body, as this court shall award." To which the appellant replied, holding the Bible and his antagonist's hand in the same manner as the other: "Hear this, O man, whom I hold by the hand, who callest thyself Thomas by the name of baptism, that thou art perjured; and

(*q*) Leg. Canut. c. 6.

(*r*) Ingulph.

(*s*) As "I will take the sacrament upon it;" "may this morsel be my last," and the like.

(*t*) *Ante*, vol. iii.

(*u*) *Ante*, p. 412 (*g*).

(*x*) Approvement was when a person, indicted of treason or felony, and arraigned for the same, confessed the fact before plea pleaded; and appealed or accused others, his accomplices, of the same crime, in order to obtain his pardon. In this case he was called

an approver or prover, *probator*, and the party appealed or accused was called the *appellee*. Such approvement could only be in capital offences.

(*y*) This rule was, however, subject to exceptions, for if the appellant or approver were a woman, a priest, an infant, or of the age of sixty, or lame, or blind, he or she might have counterpleaded and refused the wager of battle; and compelled the appellee to put himself upon the country.

(*a*) Flet. l. 1, c. 34; 2 Hawk. P. C. 426

therefore perjured, because that thou feloniously didst murder my father, William by name. So help me God, and the saints; and this I will prove against thee by my body, as this court shall award." The battle was then to be fought with the same weapons, viz. batons, the same solemnity, and the same oath against amulets and sorcery, that were used in the civil combat; and if the appellee were so far vanquished, that he could not or would not fight any longer, he was adjudged to be hanged immediately; and then, as well as if he were killed in battle, Providence was deemed to have determined in favour of the truth, and his blood was attainted. But if he killed the appellant, or could maintain the fight from sunrising till the stars appeared in the evening, he was acquitted. So also if the *appellant became recreant, and pronounced the horrible word "craven," he was [* 437] adjudged to lose his *liberam tegem*, and became infamous; and the appellee recovered his damages, and so was for ever quit, not only of the appeal, but of all indictments likewise for the same offence. Trial by battle was abolished by the statute 59 Geo. 3, c. 46 (b).

4. The fourth method of trial used in criminal cases is that by the peers of Great Britain, in the court of parliament, or in the court of the lord high steward, when a peer has been indicted. Of this enough was said in a former chapter (c); to which I may add, that, in its procedure, this solemn mode of trial differs little from the trial *per patriam*, or by jury; except that no special verdict can be given at the trial of a peer (d); because the lords of parliament, or the lord high steward (if the trial be had in his court), are judges sufficiently competent of the law that may arise from the fact: and except also, that the peers need not all agree in their verdict; but the greater number, consisting of twelve at the least, will conclude, and bind the minority (e).

5. The fifth method of trial, to be now mentioned, is trial by jury, or the country. The antiquity and excellence of this trial, for the settling of civil property, has before been explained (f). And what was then said applies yet more strongly in criminal cases; since, in times of difficulty and danger, greater evil is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the sovereign and the subject, than in disputes between one individual and another. Our law has, therefore, wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of *the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws [* 438] in the sovereign: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of *oyer* and *terminer* occasionally named by the crown: who might then imprison, dispatch, or exile any man obnoxious to the government, by an instant declaration, that such is their will and pleasure. But the founders of the English law have with excellent forecast contrived, that no man should be called on to answer to the crown for any crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury: and that the truth of

(b) See *Ashford v. Thornton*, 1 B. & Ald. 405. See also an account of the proceedings, in the case of Lord Rae and Mr. Ramsey (7 Car. 1), 11 St. Tr. 124.

(c) *Ante*, chap. xvi. p. 336.

(d) *Hat.* 116.

(e) *Kelyng*, 56; *Foster*, 247.

(f) *Ante*, vol. iii.

every accusation, whether preferred in the shape of indictment or information, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion. So that the liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate, not only from open attacks on it (which none, perhaps, would be so hardy as to make), but also from secret machinations, which might sap and undermine it.

V. Before commissioners of *oyer and terminer* and gaol delivery, the sheriff, by virtue of a general precept directed to him beforehand, returns to the court a panel of at least forty-eight jurors, for the determination of
 V. Jury process. criminal as well as civil issues at that session; and accordingly it is there usual to try all felons immediately, or soon, after their arraignment. But it was formerly not customary, nor agreeable to the general course of proceedings, (unless by consent of parties, or where the defendant was actually in custody,) to try persons indicted for misdemeanor of the same court at which they had pleaded not guilty, or traversed the indictment. But they usually gave security to the court, to appear at the next assizes or session, and then [* 439] and there to try the traverse, giving notice to the * prosecutor of the same. Now, however, the statute 14 & 15 Vict. c. 100, by its 27th section enacts, that "no person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or session of gaol delivery: provided always, that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognizance for that purpose." In felonies as well as misdemeanors the court has indeed, independently of statute, authority to postpone the trial to a subsequent assizes or sessions, for sufficient cause, as the unavoidable absence of a material witness, or the existence of a prejudice in the jury, shown upon affidavit, at the instance either of the prosecutor or the defendant. Where the application is made by the defendant, in a case of felony, the court will remand him, and detain him in custody till the next assizes or sessions; where by the prosecutor, it is in the discretion of the court to detain the defendant in custody, or admit him to bail, or discharge him on his own recognizance; but after a bill has been found, in any case of a serious nature, bail will not be taken.

What was said of juries in general, and the trial thereby, in civil cases, will greatly shorten our present remarks, with regard to the trial of criminal suits: a reference indeed to the preceding volume will show that the qualifications of petty jurors on criminal are the same as on civil trials (*g*), that the grounds of disqualification * and exemption from serving as such are likewise [* 440] the same, and what was there said respecting the mode of preparing

(*g*) See also stat. 6 Geo. 4, c. 50, s. 50.

the jury lists, returning the names of persons qualified as jurors, making up the jury book, and summoning the jurors, will now generally apply (*h*).

On a trial in the court of queen's bench for misdemeanor—though not for treason or felony—a special jury may be obtained on the application of either the prosecutor or the defendant (*i*), and the precept issued by the judges of assize for the sheriff to summon jurors for the assizes, directs him to summon a sufficient number of special jurymen not exceeding forty-eight in all to try the special jury causes, and from these a special jury will be struck (*k*); the proper number of jurors, if not in attendance, being made up by a *tales*. Where an alien (*l*) is indicted, the jury should be *de medietate linguæ*, or half foreigners, if so many are found in the place (*m*); but this does not hold in treason, aliens being very improper judges of the breach of allegiance (*n*). And the stat. 6 Geo. 4, c. 50, s. 47, expressly provides, that nothing in that act * contained shall be construed to deprive any alien indicted or impeached of any felony or misdemeanor of the right of being tried by [* 441] a jury *de medietate*, but that on the prayer of any alien so indicted or impeached, the sheriff shall, by command of the court, return for one half of the jury a competent number of aliens, if so many there be in the town or place where the trial is had, and if not, then so many aliens as shall be found in the same town or place, if any; and that no alien juror shall be liable to be challenged for want of freehold, or of any other qualification required by that act; but every such alien juror may be challenged for any other cause, in like manner as if he were qualified by the act.

VI. When the trial is called on, the jurors to the number of twelve, as they appear, are to be sworn or required to make the affirmation or declaration permitted by the statute 30 & 31 Vict. c. 35, s. 8, to persons who are unwilling from alleged conscientious motives to take an oath; before being sworn or making such affirmation or declaration, however, the jurors may be challenged.

Challenges may be made, either on the part of the crown, or on that of the prisoner; and either to the whole array, or to the separate polls, for the very same reasons that they may be made in civil causes (*o*). For it is on a criminal at least as necessary, as on a civil trial, that the sheriff or returning officer be totally indifferent; and that the particular jurors should be *omni exceptione majores*; not liable to objection either *propter honoris respectum*, *propter defectum*, *propter affectum*, or *propter delictum*.

(*h*) By stat. 6 Geo. 4, c. 50, s. 20, all courts of oyer and terminer, and gaol delivery, the superior criminal courts of the three counties palatine, and courts of sessions of the peace in England and Wales, shall respectively have and exercise the same power and authority as they had exercised, in issuing any writ or precept, or in making any award or order, orally or otherwise, for the return of a jury for the trial of any issue before any of such courts respectively, or for the amending or enlarging the panel of jurors returned for the trial of any such issue. And the 7 Geo. 4, c. 64, s. 21, enacts, that no judgment after verdict upon any indictment or information for any felony or misdemeanor shall be stayed or reversed by reason that the jury

process has been awarded to a wrong officer upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer.

(*i*) 6 Geo. 4, c. 50, s. 30.

(*k*) 15 & 16 Vict. c. 76, s. 108.

(*l*) An alien woman married to a British subject, and therefore naturalized by virtue of the 7 & 8 Vict. c. 66, s. 18, is not entitled to a jury *de medietate*. *Reg. v. Manning*, 1 Den. C. C. 467.

(*m*) 28 Edw. 3, c. 13.

(*n*) 3 Hawk. P. C. 420; 2 Hale, P. C. 271.

(*o*) *Ante*, vol. iii.

Challenges upon any of the foregoing accounts are styled challenges for cause: which may be without stint in both criminal and civil trials. But on a trial for treason or felony (*p*), there is, *in favorem vite*, allowed to [*442] *the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a peremptory challenge: a provision full of tenderness and humanity to prisoners. This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend himself) should have a good opinion of his jury, the want of which might totally disconcert him; the law will not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

This privilege, of peremptory challenge, though granted to the prisoner, is denied to the crown by the statute 6 Geo. 4, c. 50, s. 29 (*q*), which provides, that the crown shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However, it is held that the crown need not assign a cause of challenge, till all the panel is gone through and exhausted (*r*), and unless there cannot be a full jury without the person so challenged. And then, and not sooner, counsel for the crown must show the cause: otherwise the juror objected to shall be sworn (*s*). And the practice is the same in trials for misdemeanors as in those for treason or felony (*t*).

* Where there is a challenge for cause, two persons in court, not of [*443] the jury, are sworn to try whether the juryman challenged is indifferent. Evidence is then produced to support the challenge; and according to the verdict of the two tryers, the juryman is admitted or rejected (*u*).

The peremptory challenges of the prisoner must however have some reasonable boundary; otherwise he might never be tried. This reasonable boundary is in high treason (save as presently mentioned) settled to be the number of thirty-five: that is, one under the number of three full juries. For the law judges that five-and-thirty are fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number, or three full juries, has no intention to be tried at all. And therefore the common law dealt with one who peremptorily challenged above thirty-five, and would not retract his challenge, as with one who stood mute or refused to take his trial; by sentencing him to the *peine forte et dure* in felony, and by attainting him in treason (*x*). Where the treason charged is the compassing the queen's death, and an overt act alleged in the indictment is the assassination of the queen, or any direct attempt against her life, or

(*p*) A peremptory challenge is not allowed in any trial for a misdemeanor. St. Tr. ii. 808, iv. 1.

(*q*) See also the prior statute, 83 Edw. 1, stat. 4.

(*r*) *Mansell v. Reg. Dears. & B.* 375.

But as to the case of challenging a foreign

juror, where a jury *de medietate* has been claimed, see *Reg. v. Giorgetti*, 4 F. & F. 546.

(*s*) 2 Hawk. P. C. 413; 2 Hale, P. C. 271.

(*t*) St. Tr. iii. 519.

(*u*) See *O'Coigly's Case*, 26 St. Tr. 1237; *O'Brien v. Reg.* 2 H. L. Cas. 469, where the challenge was to the array.

(*x*) 2 Hale, P. C. 268.

against her person, whereby her life may be endangered, or her person may suffer bodily harm (y): as also in murder and other felonies (z): no person arraigned can be admitted to make more than twenty peremptory challenges. Where the indictment charges misprision of treason, the number of such challenges to be allowed is doubtful (a). And in *cases of misdemeanor [* 444] no right of peremptory challenge exists at all (b).

By statute 7 & 8 Geo. 4, c. 28, s. 3, if any person indicted for treason, felony, or piracy, challenge peremptorily a greater number of jurors than such person is entitled by law to challenge, every peremptory challenge beyond the number so allowed shall be void, and the trial shall proceed as if no such challenge had been made. If, again, by reason of challenges or the default of jurors, a sufficient number cannot be had of the original panel, a fresh panel will be returned (c) till the number of twelve has at length been made up and sworn or affirmed (d) well and truly to try, and true deliverance make, between our sovereign lady the queen, and the prisoner whom they have in charge: and a true verdict to give, according to the evidence. (745)

- (y) 39 & 40 Geo. 3, c. 93; 5 & 6 Vict. c. 51. (b) *Gray v. Reg.* 11 Cl. & F. 427; 2 St. Tr. 808; 4 Id. 1; Co. Litt. 156.
(z) 6 Geo. 4, c. 50, s. 29. See 1 & 2 Ph. & 808; 4 Id. 1; Co. Litt. 156.
M. c. 10, s. 7, so far as unrepealed by 26 & 27 (c) 4 Inst. 68; *Cook's Case*, 18 St. Tr. 311.
Vict. c. 125. (d) 30 & 31 Vict. c. 85, s. 8.
(a) 2 Hawk. P. C. c. 43, s. 5; 8 Inst. 27 a.

(745) "SEC. 819. When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers." U. S. Rev. Stat. p. 152, § 819, see id., §§ 1031, 4303. As to the constitutionality of legislation conferring upon the government the right of peremptory challenge, see *Walter v. People*, 33 N. Y. (5 Tiff.) 147; *Jones v. State*, 1 Kelley (Ga.), 610; *Warren v. Com.*, 1 Wright (Penn.), 45; *Hurtzell v. Com.*, 4 id. 463; *Walston v. Com.*, 16 B. Monr. (Ky.) 15; *Oregier v. Bunton*, 2 Strobb. (S. C.) 487.

The number of peremptory challenges to which the defendant is entitled in the several States of the Union is variously regulated by statutes; and the statutes and decisions of the particular State should be consulted on this point. See, generally, *W. & W. Turnpike v. People*, 9 Barb. 161, 166; *State v. Allen*, 8 Rich. (S. C.) 448; *State v. Cadwell*, 1 Jones (N. C.), 289; *State v. Humphreys*, 1 Tenn. 306; *Noles v. State*, 24 Ala. 672; *Schumaker v. State*, 5 Wis. 324; *Martin v. State*, 16 Ohio, 364; *Hooper v. State*, 5 Yerg. (Tenn.) 422.

The right to challenge a juror, either on the part of the prosecution or the defense, remains open until the juror is sworn. *Munly v. State*, 7 Blackf. (Ind.) 593; *Morris v. State*, id. 607; *Williams v. State*, 3 Kelley (Ga.), 458; *People v. Jenks*, 24 Cal. 11; *Clarke v. Territory*, 1 Wash. Terr. 83. But the moment the oath has begun it is too late. See *State v. Cameron*, 2 Chand. (Mich.) 172; *Com. v. Knapp*, 10 Pick. (Mass.) 477; *McClure v. State*, 1 Yerg. (Tenn.) 206; *Brattan v. Bryan*, 1 Marsh. (Ky.) 212. It is ruled, however, that after a juror has been sworn in chief, and taken his seat, if it be discovered that he is incompetent to serve, he may, in the exercise of a sound discretion, be set aside by the court at any time before evidence is given; and this may be done even in a capital case, and as well for cause existing before as after the juror was sworn. *McGuire v. State*, 37 Miss. 369; *People v. Dawson*, 13 Wend. 351; *Toole v. Com.*, 11 Leigh (Va.), 714; *Com. v. McFadden*, 11 Harr. (Penn.) 12; *U. S. v. Morris*, 1 Curtis' C. C. 23.

It has been held that the peremptory challenge must be made by the prisoner in person. *State v. Price*, 10 Rich. (S. C.) 351. But in practice it is usually made by counsel.

VII. When the jury is sworn, the indictment is usually opened, and the evidence marshalled, examined, and enforced by the counsel for the crown, or prosecution, whose duty in conducting the case differs in some respects from that of counsel for the plaintiff at a civil trial. In the former situation counsel are to regard themselves as assisting in the administration of justice not as advocating a particular interest, nor as pledged to support a particular view. Before a criminal tribunal counsel for the crown must satisfy the jury that the offence charged in the indictment has been committed by the prisoner, or if the entire charge be divisible, that so much of it is true as will warrant a verdict of guilty in respect to that portion of it. Where the offence charged is such at common law, the substance of and ingredients in it must be established. Where an offence is such by statute, the statutory ingredients in it must be made out. Such [* 445] ingredients respectively may for the most part be collected from the preceding pages. As to the mode of proving them a few suggestions may here be proper.

Evidence may be either direct and positive or presumptive and circumstantial. A presumption of any fact is an inferring of that fact from other facts that are known; it is an act of reasoning. A fact, however, must not be inferred without premises that will warrant the inference, for the law holds that it is better that ten guilty persons escape, than that one innocent person suffer. If, however, no fact could thus be ascertained by inference, in a court of law, very few offenders would be brought to punishment. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction. No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, and the accused offers none, human reason cannot do otherwise than adopt the conclusion to which the proof tends (e). Such is in brief the nature of presumptive evidence and the reason for admitting it. And there is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon the principle of giving weight to presumptions; for as it seldom happens that absolute certainty can be obtained in human affairs, therefore reason and public utility require that judges and all mankind in forming their opinions of the truth of facts should be regulated by a preponderance of probabilities. Accordingly, in the highest crime known to the law, viz. treason, our courts act upon presumption. On [* 446] proof of rebellion or the endeavour to excite rebellion, * they presume an attempt to kill the sovereign. In homicide, upon proof of the fact of killing, they presume the malice necessary to constitute murder, and

(e) *R. v. Burdett*, 4 B. & Ald. 161—2.

As to what previously-received impressions of the party called as a juror as to the guilt of the accused should exclude him from sitting, see the following cases: *Stout v. People*, 4 Park. 71, 132; *People v. Mather*, 4 Wend. 229; *Com. v. Flanagan*, 7 Watts & S. (Penn.) 415; *Holt v. People*, 13 Mich. 224; *State v. Ellington*, 7 Ired. (N. C.) 61; *Moses v. State*, 11 Humph. (Tenn.) 283; *State v. Burnside*, 87 Mo. 343; *State v. Fox*, 1 Dutcher (N. J.), 566; *State v. Webster*, 13 N. H. 491; *Armistead v. Com.*, 11 Leigh (Va.), 657.

put it on the prisoner by extracting facts in cross-examination or by direct testimony to lower his offence to manslaughter or justifiable homicide. In burglary, highway robbery, or simple larceny, if a person is found in possession of the goods recently after the crime has been committed, our law presumes the possessor guilty, unless he can account for the possession. In the case of a libel which is charged to be written with a particular intent, if the libel is calculated to produce the effect charged to be intended, the intent will be presumed. We must, as reasonable beings, act on presumptive proof, or leave the worst crimes unpunished; though where presumption is attempted to be raised as to the *corpus delicti*—the commission of the substantive act charged—such presumption ought to be strong and cogent (*f*). (746)

The doctrine of evidence as regards pleas of the crown is, in most respects, the same as that recognised in civil actions (*g*). The case for the prosecution must be established, 1, by admissible evidence, and, 2, by competent witnesses.

1. No proof is admissible which in its very nature indicates the existence of some better proof; thus hearsay evidence is not admissible. (747) This is the objection perhaps most commonly taken to the reception of evidence at a

(*f*) Sir Matthew Hale (2 P. C. 390) lays down two rules in connection with the above subject which ought generally to be observed: 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods: and, 2. Never to convict any person

of murder or manslaughter, till at least the body be found dead; on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing.

(*g*) *Vide Per* Lord Erskine, C., at Lord Melville's trial, 29 St. Tr. 764.

(746) The American rule, according to some authorities, is held to be that "neither circumstantial proof of the offense nor proof by the confessions of the defendant can be accepted as satisfactory in law, unless, besides this, there is direct evidence of the *corpus delicti*." 1 Bish. Cr. Proced., § 1071. Thus it is held that to warrant a conviction for murder the death must be proved directly in some way, either by the finding and identification of the corpse, or by proof of criminal violence sufficient to produce death, and exerted in such a manner as to account for the disappearance of the body. Also, that the *corpus delicti* in murder has two components, death as the result, and the criminal agency of another as the means. It is only when there is direct proof of the one that the other can be established by circumstantial evidence. *Ruloff v. People*, 18 N. Y. (4 Smith) 179; *People v. Bennett*, 49 N. Y. (4 Sick.) 137; *Pitts v. State*, 43 Miss. 473. See in further illustration of this subject, *State v. Davidson*, 30 Vt. 377; *Smith v. Com.*, 21 Gratt. (Va.) 809; *State v. Keeler*, 28 Iowa, 553; *State v. Williams*, 7 Jones (N. C.), 446; *Brown v. State*, 33 Miss. 433.

In a noted American case the alleged victim made his appearance just in time to save from being hung a person who had been indicted for murdering him, and who actually had made a confession of his guilt. *Boorn's Case*, 1 Greenl. Ev., § 214; 1 Whart. Cr. Law, § 746; 10 N. A. Review, 418.

(747) That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible. MARSHALL, C. J., in *Mina Queen v. Hepburn*, 7 Cranch, 290, 296. See *Davis v. Wood*, 1 Wheat. 6, 8.

On an indictment for murder the admissions of other persons that they killed the deceased are not evidence (*Smith v. State*, 9 Ala. 990; *State v. Duncan*, 6 Ired. [N. C.] 326); nor, on an indictment for larceny, are the declarations of third parties that they committed the theft admissible. *Rhea v. State*, 10 Yerg. (Tenn.) 258.

[* 447] trial for any ordinary offence; statements of third persons * made in the absence of the prisoner, being spoken to as evidence against him, when, in fact, such third persons themselves ought to be put into the witness-box to testify. Some few exceptions only to this rule which excludes hearsay evidence need here be mentioned. (1.) The deposition of a witness taken by the committing magistrate under the provisions of the statute 11 & 12 Vict. c. 42, and purporting to be signed by him, may at the trial of the accused person be read as evidence against him on the part of the prosecution on proof of any credible witness, that the deponent is dead, or so ill as not to be able to travel; further, that such deposition was taken in the presence of the accused person, and that he or his counsel or attorney had a full opportunity of cross-examining the witness; but such deposition will be inadmissible if proved not in fact to have been signed by the justice purporting to sign the same (*h*). Also the statement of a person dangerously ill and not likely to recover taken by a justice in pursuance of the 30 & 31 Vict. c. 35, s. 6—on proof that the person who made the statement is dead, or that there is no reasonable probability that he will ever be able to travel or to give evidence—may be read in evidence, either for or against the accused, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement was served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same.

[* 448] The deposition of a witness who is withdrawn by * procurement of the accused from giving evidence may likewise be read (*i*).

(2.) Upon a trial for felonious homicide the declarations of the deceased made when he believed himself to be in a dying state and past hope of recovery are admissible, the death of the deceased being the subject of the charge, and the circumstances of the death being the subject of the dying declaration (*k*).

(3.) An admission or confession made by the accused is likewise admissible in evidence against him if freely and voluntarily made—neither induced by a threat of evil, nor by the holding out of any benefit to him (*l*), and,—

(4.) The statement of the prisoner taken before the committing magistrate under the 11 & 12 Vict. c. 42, s. 18, may if necessary be given in evidence against him. (748)

(*h*) 11 & 12 Vict. c. 42, s. 17 (see *Reg. v. Woodcock*, 1 Leach, C. C. 502; *Reg. v. Smith, Stephenson*, L. & C. 165); 30 & 31 Vict. c. 35, L. & C. 607.

s. 8.

(*i*) *R. v. Harrison*, 12 St. Tr. 852.

(*l*) *Reg. v. Jarvis*, 37 L. J. M. C. 1; *Reg. v. Parker*, L. & C. 42.

(*k*) *R. v. Mead*, 2 B. & Cr. 605, 608; *R. v.*

(748) As to the admissibility of the testimony of a deceased witness, the rule is stated to be that such testimony, given on a former trial or examination, may be proved at a subsequent trial by persons who heard him testify, where the party against whom the testimony is offered had an opportunity to cross-examine the witness in the former proceeding. *O'Brian v. Com.*, 6 Bush (Ky.), 568; *Rhine v. Robison*, 27 Penn. St. 80; *State v. McO'Blennis*, 24 Mo. 402; *Summons v. State*, 5 Ohio St., 825; *People v. Diaz*, 6 Cal. 248; *Barnett v. People*, 54 Ill. 825; *Finn v. Com.*, 5 Rand. (Va.) 701; *U. S. v. Macomb*, 5 McLean's C. C. 287; 1 Bish. Cr. Law, § 667 (*e*). And the testimony of a witness, absent through the procure-

2. No one is competent to give evidence in a court of justice who by reason of immaturity of years or mental affection is unable to comprehend the nature and obligation of an oath—or who through want of religious belief denies its

ment of the accused, may be read in evidence from the memorandum made by the committing magistrate. *State v. Houser*, 26 Mo. 431; *Williams v. State*, 19 Ga. 402.

The common-law principle as to the admissibility of dying declarations is held not to be abrogated by the constitutional provision in many of the States that the accused shall be confronted by the witnesses against him. *State v. Nash*, 7 Iowa, 347; *Miller v. State*, 25 Wis. 384; *Woodside v. State*, 2 How. (Miss.) 655; *Campbell v. State*, 11 Ga. 355; *Robbins v. State*, 8 Ohio St. 181; *Anthony v. State*, 1 Meigs (Tenn.), 265. And on the trial of an indictment for the murder of a wife by her husband, the declarations of the deceased, made *in extremis*, as to the cause of her death, are competent evidence against the prisoner. (*Penn. v. Stoops*, Add. [Penn.] 381; *People v. Green*, 1 Denio, 614); and the rule is the same as to the dying declarations of a husband against the wife. *Moore v. State*, 12 Ala. 764.

Where the declarations of the party injured constitute a part of the *res gesta*, they are admissible without proof of a consciousness of approaching death (*Com. v. Hockett*, 2 Allen [Mass.], 136; *Com. v. M'Pike*, 3 Cush. [Mass.] 181); but in such case they must be confined to the mere statements necessary to give information relating to the injury. *Denton v. State*, 1 Swan (Tenn.), 279. And see *Donnelly v. State*, 2 Dutch. (N. J.) 463, 601. The question as to the admissibility of dying declarations is one exclusively for the consideration of the court. *Id.*; *State v. Williams*, 68 N. C. 62; *Com. v. Murray*, 2 Ashm. (Penn.) 41; *Hill's Case*, 2 Gratt. (Va.) 594; *People v. Glenn*, 10 Cal. 32; *Starkey v. People*, 17 Ill. 17; *State v. Poll*, 1 Hawks (N. C.), 442; *Lambert v. State*, 23 Miss. 322. See *contra*, *Campbell v. State*, 11 Ga. 354. And they have been admitted in favor of a prisoner. See *Moore v. State*, 12 Ala. 764. But to be admissible in favor of a prisoner they must be made under a sense of impending dissolution. *Com. v. Densmore*, 12 Allen (Mass.), 585.

It is a general rule that confessions freely and voluntarily made are admissible in evidence. *Com. v. King*, 8 Gray (Mass.), 501; *State v. Kirby*, 1 Strobb. (S. C.) 155; *Aiken v. State*, 35 Ala. 399; *Aaron v. State*, 39 id. 75; *Hartung v. People*, 4 Park. 319; *O'Brien v. People*, 48 Barb. 274. But in the United States in particular there is an increasing unwillingness to rest convictions on confessions alone (see *State v. Scott*, 39 Mo. 424; *State v. Lalizer*, 4 Minn. 368); and it is gradually becoming a settled rule of law that a mere confession of the party charged with crime, uncorroborated by circumstances tending to inspire belief of its truth, is insufficient to justify conviction. *People v. Badgley*, 16 Wend. 53; *Stringfellow v. State*, 26 Miss. 157; *Bergen v. People*, 17 Ill. 426; *Robinson v. State*, 12 Mo. 592; *Jenkins v. State*, 41 Miss. 582. And see *ante*, 617, note 745.

Where any inducement of hope or fear is held out to a prisoner to make a confession, or his confession is brought about by threats or physical pain, his admissions thus made are not evidence against him. *State v. Phelps*, 11 Vt. 116; *Miller v. People*, 39 Ill. 457; *Com. v. Ohabdock*, 1 Mass. 144; *Smith v. State*, 10 Ind. 106; *Wiley v. State*, 3 Coldw. (Tenn.) 362. And torture, to extort confession, is indictable at common law. *State v. Hobbs*, 2 Tyler (Vt.), 308.

Confessions made during sleep are inadmissible as evidence against the party making them. *People v. Robinson*, 19 Cal. 40. And confessions made by one so intoxicated as not to understand them, are no evidence of guilt. *Com. v. Howe*, 9 Gray (Mass.), 110. See *Jefferds v. People*, 5 Park. 523.

Declarations by a prisoner in his own favor, unless part of the *res gesta*, are not admissible for the defense (*Corbett v. State*, 81 Ala. 329; *Newcomb v. State*, 37 Miss. 333; *Hall v. State*, 40 Ala. 698; *State v. Jackson*, 17 Mo. 544; *State v. Scott*, 1 Hawks [N. C.], 24; *Bland v. State*, 2 Carter [Ind.], 608; *Tipper v. Com.*, 1 Metc. [Ky.] 6); but the rule is otherwise when they are part of the *res gesta*. *Com. v. Rowe*, 105 Mass. 590.

It is the province of the court in its discretion, and not of the jury, to determine whether a confession be made with that degree of freedom which is necessary to make it admissible evidence (*Rife v. Com.*, 29 Penn. St. 429; *Bristol v. State*, 26 Ala. 107; *Clarke v. State*, 35 Ga. 105; *State v. Squires*, 48 N. H. 364); but it is for the jury to estimate the degree of credit due to a confession under all the circumstances of the case. See *Young v. Com.*, 8 Bush (Ky.), 366.

obligation (m). No person charged with the commission of an indictable offence can be examined as a witness at his trial (n), and husband or wife cannot testify in a criminal case for or against each other (o), except on a trial for treason or bigamy, or unless where the very nature of the offence charged—as if it be a personal wrong done to the wife—necessitates a qualification of the rule (p). (749)

(m) *Maden v. Catanach*, 7 H. & N. 360.

(n) See 14 & 15 Vict. c. 99, s. 3.

(o) 16 & 17 Vict. c. 83, s. 2.

(p) *Lord Audley's Case*, 3 St. Tr. 402, 418; Best, Evid. 4th ed. 246. The evidence of a

witness whose incompetency appears during the examination in chief may be withdrawn from the jury. *Reg. v. Whitehead*, 1 C. L. R. (C. C.) 83.

(749) It was once thought that an idiot or a lunatic was incompetent to give evidence (see *Robinson v. Dana*, 16 Vt. 494; *Armstrong v. Timmons*, 3 Harr. (Del.) 342); but it is now settled that either may be received as a witness, if in the discretion of the court he appears to have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct answer to the questions put. *Kendall v. May*, 10 Allen (Mass.), 59; *Campbell v. State*, 23 Ala. 44; *Holcomb v. Holcomb*, 28 Conn. 177; 1 Whart. Cr. Law, § 752. So a person who is deaf and dumb merely is not an incompetent witness, if otherwise capable. *People v. McGee*, 1 Denio, 19; *Snyder v. Nations*, 5 Blackf. (Ind.) 295; *Com. v. Hill*, 14 Mass. 207; *State v. De Wolf*, 8 Conn. 98. But a witness who is intoxicated ought not to be sworn, or to be permitted to testify; and the court before which the witness is produced may decide from its own view, whether the witness is in such a situation that he ought not to be admitted. *Hartford v. Palmer*, 16 Johns. 143; *State v. Underwood*, 6 Ired. (N. C.) 96; *Gould v. Crawford*, 2 Barr. (Penn.) 89.

As competency depends not upon age, but upon understanding, an infant of any age may be a witness, if it appears to sufficiently understand the nature and moral obligation of an oath. *Jackson v. Gridley*, 18 Johns. 98; *Com. v. Hill*, 14 Mass. 207; *Warner v. State*, 25 Ark. 477; *Flanagin v. State*, 25 id. 92; *State v. Denis*, 19 La. Ann. 119; *State v. De Wolf*, 8 Conn. 98. The question of admissibility is referred to the court (*Com. v. Mullins*, 2 Allen [Mass.] 295); but the credibility of such witness is left to the jury. *State v. Whittier*, 21 Me. 341; *Com. v. Lattin*, 29 Conn. 389; *Com. v. Hutchinson*, 10 Mass. 225; *State v. Le Blanc*, 3 Brev. (S. C.) 339.

A person not believing in the existence of a Supreme Being who will punish false swearing is not a competent witness. *Blair v. Seaver*, 26 Penn. St. 274; *People v. McGarren*, 17 Wend. 460; *Com. v. Barnard*, Thach. Crim. Cas. 431. But in this country it is regarded as immaterial whether the witness believe that the punishment will be inflicted in this world or in the next. See *People v. Matteson*, 2 Cow. 433; *Brock v. Milligan*, 1 Wilcox (10 Ohio), 125; *Wakefield v. Ross*, 5 Mason's C. C. 18. See, also, on this subject, *Cubbison v. McCreary*, 2 W. & S. (Penn.) 262; *Butts v. Swartwood*, 2 Cow. 431; *Blocker v. Burness*, 2 Ala. 354; *Hunscomb v. Hunscomb*, 15 Mass. 184; *Smith v. Coffin*, 6 Shep. (Me.) 157. In some of the States the want of religious belief goes to the credibility and not to the competency of a witness. N. Y. Const. 1846, Art. 1, § 3; *Standro v. Hopkins*, 28 Barb. 265.

Statutes have been enacted in several of the States of the Union within the last few years authorizing the examination of a defendant on trial in his own behalf. See, as to Massachusetts, Stat. 1866, p. 245; New York, Act of May 7, 1869, § 1; *Brandon v. People*, 42 N. Y. (3 Hand) 265; *Connors v. People*, 50 N. Y. (5 Sick.) 240; Pennsylvania, Act of April 3, 1872; Ohio, Code Crim. Proc., §§ 139, 140. And under these statutes it has been held generally that an accused person, by consenting to be a witness in his own behalf, thereby subjects himself to the same rules and tests that are applicable to other witnesses; and his right to object to any question pertinent to the issue, on the ground that the answer may tend to criminate him, is waived. *Com. v. Lannan*, 13 Allen (Mass.), 563; *Connors v. The People*, 50 N. Y. (5 Sick.) 240; *Burdick v. People*, 58 Barb. 51; *Brandon v. People*, 42 N. Y. (3 Hand) 265; *Com. v. Morgan*, 107 Mass. 199; *Com. v. Mullen*, 97 Mass. 545. Co-defendants may be witnesses for each other under the statutes (*State v. Gisher*, 23 Iowa, 318); but they leave untouched the common-law rule as to the incompetency of husband and wife as witnesses for each other. *People v. Reagle*, 60 Barb. 527; *Steen v. State*, 20 Ohio St. 333.

Not only must the evidence offered for the prosecution be admissible and the witnesses be competent, but the *proofs must be elicited by [* 449] questions properly worded and directed.

1. An irrelevant question ought not to be put. And this rule of rejecting all manner of evidence in criminal prosecutions that is foreign to the point in issue is founded on sound sense and common justice. For "no man," it has been said (*g*), "is bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life. Few even of the best men would choose to be put to it." The rule, moreover, which requires certainty in the indictment (*r*), would be nugatory if evidence irrelevant to the issue raised upon it were admitted. And further, the time of the court must not be uselessly occupied; nor should the attention of the jury be invited to inquiries immaterial—or frivolous—and foreign to the real points for their decision.

2. An artifice of this sort is not permitted—to get from a witness by means of a "leading question" the narrative desired, to suggest the answer which would be acceptable by the very wording and framing of the question. The putting of leading questions, except where allowed with a view to saving of time, and in respect of matters the eliciting of which cannot prejudice the prisoner, or by permission of the court where a witness is manifestly hostile—is much to be deprecated (*s*).

As regards respectively the examination of witnesses and the proof of instruments and handwriting, the following statutory regulations have been promulgated:—

1. The party producing a witness will not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made *at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement (*t*).

2. It is not necessary to prove by the attesting witness an instrument to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness thereto (*u*).

3. Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine may be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute (*x*).

As regards the number of witnesses needed to support a conviction in certain cases, the following peculiarities are noticeable.

(*g*) Foster Disc. High Treason, c. 2, s. 9.

(*r*) *Ante*, p. 408.

(*s*) In *Hardy's Case*, 24 St. Tr. 659, 755, Buller, J., observed, "you may lead a witness upon a cross-examination to bring him directly to the point as to the answer, but cannot go the length of putting the very words into a witness's mouth which he is to echo back again."

(*t*) 28 Vict. c. 18, s. 8.

(*u*) *Id.* s. 7.

By the 17 & 18 Vict. c. 88, t. 27, every instrument liable to stamp duty is admissible in evidence in any criminal proceeding, although not stamped as required by law.

(*x*) 28 Vict. c. 18, s. 8.

In case of high treason or misprision of treason, by statutes 1 Edw. 6, c. 12, and 5 & 6 Edw. 6, c. 11, two lawful witnesses are required to convict a prisoner; unless he shall willingly and without violence confess the same. By statute 7 Will. 3, c. 3, in a prosecution for treason, the same rule of requiring two witnesses is again enforced; with this addition, that the confession of the prisoner, which shall countervail the necessity of such proof, must be in open court. In the construction of which act it has been held (*y*), that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. But hasty unguarded confessions, made to persons having no [*451] such authority, *ought not to be admitted as evidence under this statute. And indeed, even in cases of felony at the common law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifices, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence. By the same statute of 7 Will. 3 it is declared, that both witnesses must be to the same overt act of treason, or one to one overt act, and the other to another overt act, of the same species of treason (*z*), and not of distinct heads or kinds: and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. And therefore in *sir John Fenwick's* case, in king William's time, where there was but one witness, an act of parliament (*a*) was made on purpose to attain him of treason, and he was executed (*b*).

In high treason where the overt act alleged is the killing of the queen, or any direct attempt against her life or person, and in misprision of such treason, one witness is sufficient (*c*). And in support of almost every other accusation one positive witness will suffice. Montesquieu, indeed, lays it down for a rule (*d*), that those laws which condemn a man to death in any case, on the deposition of a single witness, are fatal to liberty: and he adds this reason, that the witness who affirms, and the accused who denies, make an equal balance (*e*); there is a necessity therefore to call in a third man to incline the scale. But this seems to be carrying matters too far: for there are some crimes, in which the very privacy of their nature excludes the possibility of having more than one witness; must these therefore escape unpunished? Neither indeed [*452] is the bare denial of the person accused *equivalent to the positive oath of a disinterested witness. In cases of indictments for perjury, this doctrine is better founded; and there our law adopts it: for one witness is not allowed to convict a man indicted for perjury; because then there is only one oath against another (*f*). In a case of treason also there is the accused's oath of allegiance, to counterpoise the information of a single witness; and that may perhaps be one reason why the law requires a double testimony to

(*y*) Foster, 240—244.

(*z*) *Fost.* 235.

(*a*) Stat. 8 Will. 3, c. 4.

(*b*) *Proceedings against Sir John Fenwick*, 18 St. Tr. 587.

(*c*) 89 & 40 Geo. 3, c. 98; 5 & 6 Vict. c. 51,

a. 1.

(*d*) Sp. L. b. 12, c. 3.

(*e*) Beccar. c. 18.

(*f*) In *Reg. v. Shaw*, L. & C. 579, 590, Erle, C. J., observes, "It is well-ascertained law

that upon an indictment for perjury it is necessary to have more than the evidence of one witness alone; for that is but the oath of one against one, which leaves the matter even, and entitles the prisoner to an acquittal. The prosecution must do more than that. They must turn the scale by corroborating their witness. The degree of corroboration, however, which is necessary, is not definable, and any attempt to define it will prove illusory."

convict him: though the principal reason, undoubtedly, is to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.

At the close of the case for the prosecution, the presiding judge will, if the accused be defended by counsel, ask whether it is intended to adduce evidence for the defence, and if none is to be offered (*g*), the counsel for the prosecution will be allowed to address the jury a second time, for the purpose of summing up the evidence for the crown (*h*).

It was formerly a settled rule at common law, that no counsel should be allowed a prisoner upon his trial for felony, unless some point of law arose proper to be debated (*i*); and the hardship of this rule was so apparent * that the judges never scrupled to allow a prisoner counsel to instruct [* 453] him what questions to ask, or even to ask questions for him, with respect to matters of fact: for as to matters of law arising on the trial, he was entitled to the assistance of counsel. (750) Lest, however, this indulgence should be intercepted by superior influence, in the case of state-criminals, the legislature directed by statute 7 Will. 3, c. 3, that persons indicted for high treason, or misprision thereof, may make their full defence by counsel, not exceeding two, to be named by the prisoner and assigned by the court or judge: and the same indulgence, by statute 20 Geo. 2, c. 30, was extended to parliamentary impeachments for high treason, which were excepted in the former act. In misdemeanors, the defendant was always allowed counsel as in civil actions. And now, by the 6 & 7 Will. 4, c. 114, s. 1, all persons tried for felony are admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel, or by attorney in courts where attorneys practise as counsel. Also by the 28 & 29 Vict. c. 18, s. 2, "upon every trial for felony or misdemeanor, whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively: and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be

(*g*) Where presumptive and circumstantial evidence is mainly or wholly relied upon for the prosecution, witnesses will not probably be called for the prisoner, unless to speak to character, or where an *alibi* is meant to be established; the defence will rather rest upon a chain of reasoning so put together as

to show that the deductions and inferences relied on for the crown are not fair, natural, and reasonable deductions and inferences, or such as ought alone to satisfy the conscientious scruples of a jury.

(*h*) 28 Vict. c. 18, s. 2.

(*i*) 2 Hawk. P. C. 400.

(750) The right of prisoners to appear by counsel in the federal tribunals is guaranteed by the Constitution of the United States. U. S. Const. Amend., art. 6. And the constitutions of the several States contain provisions securing the same right. If the defendant is too poor to employ counsel the court will assign him counsel; and counsel thus assigned cannot refuse the trust (see *Viss v. Hamilton Co.*, 19 Ill. 18; *Ross v. Fuba Co.*, 17 Cal. 61; *People v. Moice*, 15 id. 329); and it is held that they cannot recover from the county compensation for such services. *Id.* But see *contra*, *Dane v. Smith*, 18 Wis. 585; *Carpenter v. Dane*, 9 id. 274; *Webb v. Baird*, 6 Ind. 13; *Blythe v. State*, 4 id. 525; *Hall v. Washington*, 2 Greene (Iowa), 478; *Davis v. Linn*, 24 Iowa. 508; *Commissioners v. Hall*, 7 Watts (Penn.), 290.

It is held to be the constitutional right of the prisoner to have his case fully argued before the jury (*People v. Keenan*, 13 Cal. 531); subject, however, to the control of the court over the course of the argument, to prevent abuse of the right. *Word v. Com.*, 3 Leigh (Va.), 743. See *Lynch v. State*, 9 Ind. 541; *Com. v. Porter*, 10 Metc. (Mass.) 263.

entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded to sum up the evidence respectively."

According to another ancient and commonly received rule (*k*) (derived from the civil law), as counsel were not allowed to a prisoner accused of felony, so neither was he suffered to exculpate himself by the testimony of witnesses.

[* 454] * And therefore it deserves to be remembered to the honour of queen Mary, that when she appointed sir Richard Morgan chief justice of the common pleas, she enjoined him, "that notwithstanding the old error, which did not admit any witness to speak, or any other matter to be heard, in favour of the adversary, her majesty being party; her highness's pleasure was, that whatsoever could be brought in favour of the subject should be admitted to be heard: and, moreover, that the justices should not persuade themselves to sit in judgment otherwise for her highness than for her subject" (*l*). Afterwards, in one particular instance (when embezzling the queen's military stores was made felony by statute 31 Eliz. c. 4), it was provided, that any person impeached for such felony, "should be received and admitted to make any lawful proof that he could, by lawful witness or otherwise, for his discharge and defence:" and the courts grew so heartily ashamed of a doctrine thus unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath (*m*): the consequence of which still was, that the jury gave less credit to the prisoner's evidence, than to that produced by the crown (*n*). At length, however, by the statute 7 Will. 3, c. 3, the same measure of justice was established throughout all the realm, in cases of treason within the act: and it was afterwards declared by statute 1 Ann. st. 2, c. 9, that in all cases of treason and felony, witnesses for the prisoner should be examined upon oath, in like manner as the witnesses against him.

In cases of high treason, or misprision of such treason, it is enacted by statute 7 Will. 3, c. 3, that the prisoner shall have a copy of the indictment, but not the names of the witnesses, five days at least before the trial; that is, [* 455] upon the true construction of the act, before his *arraignment (*o*); for then is his time to take any exceptions thereto, by way of plea or demurrer: thirdly, that he shall also have a copy of the panel of jurors two days before his trial: and, lastly, that he shall have the same compulsive process to bring in his witnesses for him as was usual to compel their appearance against him. And, by statute 7 Ann. c. 21, s. 11, a person indicted for high treason or misprision thereof—(except where the treason consists in compassing or imagining the death, or any bodily harm tending to the death, or wounding, of the queen, and in case of misprision of such treason, where the overt act (*p*) alleged in the indictment shall be any attempt to injure her person),—is entitled to have not only a copy of the indictment, but a list of the panel from which the jurors will be taken, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses; the better to prepare him to make his challenges and defence.

By the 6 Geo. 4, c. 50, s. 21 (*q*), when any person is indicted for high trea-

(*k*) St. Tr. i. *passim*.

(*l*) Hollingsh. 1112; St. Tr. i. 887.

(*m*) See *R. v. Thomas*, 2 Bulst. 147; *Tyndal's Case*, Cro. Car. 292.

(*n*) Sir Edward Coke protests strongly against this tyrannical practice. 3 Inst. 79.

(*o*) *Fost.* 230.

(*p*) 39 & 40 Geo. 3, c. 93; 5 & 6 Vict. c. 51, s. 1.

(*q*) Repealing the 7 Ann. c. 21, so far as it relates to giving a list of the jury.

son, or misprision of treason, in any court other than the court of queen's bench, a list of the petit jury, mentioning the names, professions, and places of abode, of the jurors, shall be given at the same time that the copy of the indictment is delivered to the party indicted, *i.e.* ten days before arraignment, and in the presence of two or more credible witnesses; and when any person is indicted for high treason or misprision of treason in the court of queen's bench, a copy of the indictment shall be delivered within the time, and in the manner aforesaid, but the list of the petit jury may be delivered to the party indicted at any time after arraignment, so as the same be delivered ten days before the day of trial (*r*). These provisions, however, do not * extend [* 456] to an indictment for treason in compassing and imagining the death of the sovereign, or for misprision of such treason, where the overt act or overt acts of such treason alleged in the indictment shall be assassination or killing of the queen, or any direct attempt against her life or person.

In felony, the prisoner is not entitled to a copy of the indictment (*s*). In offences inferior to felony, on the other hand, it seems that the claim to have such copy has at all times been admitted (*t*). And now, by 60 Geo. 3 & 1 Geo. 4, c. 4, s. 8, in prosecutions for misdemeanors, instituted by the attorney or solicitor-general in any court therein mentioned (*u*), a copy of the information or indictment shall, if required, be delivered, after appearance, to the party prosecuted, or his attorney, free of expense to the applicant.

By the statute 6 & 7 Will. 4, c. 114 (*x*), persons held to bail or committed for trial, for any offence against the law, shall be entitled, on demand, to copies of the examinations of the witnesses upon whose depositions they were held to bail or committed, on payment of a reasonable sum, but if such demand be not made before the day appointed for the commencement of the assizes or sessions at which the trial is to take place, such persons shall not be entitled to have any such copy, unless the judge be of opinion that it may be made and delivered without delay or inconvenience to the trial. And by s. 4 of the same statute all persons under trial are entitled, at the time of their trial, to inspect, without fee or reward, the depositions which have been taken against them, and returned into the court before which such trial shall be had. A like provision is contained in the 27th section of the stat. 11 & 12 Vict. c. 42, which enacts that at any time after the * examinations of witnesses against a person charged with an indictable offence have been [* 457] completed, and before the first day of the assizes or sessions, or first sitting of the court at which such person is to be tried, he shall be entitled to have copies of the depositions on which he was committed or held to bail, on payment of a reasonable sum for the same. The accused is also entitled to copies of the depositions of the witnesses examined on his behalf before the committing magistrate, under the 3rd section of the 30 & 31 Vict. c. 35 (*y*).

The object of the prisoner's counsel at a criminal trial may be twofold—1. to exculpate his client by independent proofs; 2. to discredit the witnesses for the crown. And evidence to impeach the credibility of a witness will be obtained (1), should he on cross-examination be made to contradict himself, or be involved in inconsistencies. Such evidence may tend to show (2) that he was a spy and

(*r*) See *Reg. v. Frost*, 9 C. & P. 129, 131.

(*s*) *Per* Lord Kenyon, C. J.; *R. v. Holland*, 4 T. R. 692; 2 Hawk. P. C. 410.

(*t*) *Lady Falkland's Case*, Cro. Car. 482, 3.

(*u*) Sessions of the peace, of oyer and terminer and gaol delivery.

(*x*) Sect. 3.

(*y*) See s. 4.

informer, or (3) that he was an accomplice, or (4) that he has been convicted of some crime, or (5) that he is not to be believed upon his oath. As to each of these grounds for attempting to discredit a witness at a criminal trial, some brief remarks will be offered.

(1). A witness may be not altogether untrustworthy who on a skilful cross-examination becomes involved in contradictions, for this may be through the weakness of his memory, or possibly through the nervousness and confusion in which he finds himself when subjected to so severe and unaccustomed an ordeal. It will be for the jury to observe the demeanor, and compare the answers of a witness thus contradicting himself, and to form their opinion accordingly.

In connection with this head of our subject we may add, that if a witness, upon cross-examination as to a former statement made by him inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in *fact make it; but [* 458] before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement (z). Further, a witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject matter of the indictment, without such writing being shown to him; though if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; but the judge, at any time during the trial, may require the production of the writing for his inspection, and may thereupon make such use of it for the purposes of the trial as he may think fit (a).

(2). To persons who enter into communication with conspirators in pursuance of an original purpose of disclosing their designs and machinations for the benefit of the public, much disfavour naturally attaches. The testimony of an informer is, however, legally admissible (b), and the existence of the original purpose on his part is best evinced by a conduct which precludes him from ever wavering in or swerving from the discharge of his duty, if he might otherwise be disposed to do so (c).

(3). Evidence to impeach the character and credibility of a witness may tend to show that he was an accomplice—that he was criminally engaged and mixed up in the transactions to which he afterwards deposes. An accomplice is clearly admissible as a witness (d). His testimony is however to be received and acted upon with a scrupulous consideration of its merit and value. He comes *sullied with some degree of contamination by having participated in the very crime which he imputes to others. The witness who comes thus *primâ facie* contaminated may nevertheless be so confirmed by the clearness and consistency of his own narrative, and still more by its conformity to and coincidence with the substance of the testimony of others not likely to have conspired with him in the crime itself, or to have had the means of concerting and colluding with him as to the matter of his testimony—that

(z) 28 & 29 Vict. c. 18, s. 4.

(a) Id. s. 5.

(b) *Despard's Case*, 28 St. Tr. 487, 489.

(c) Id.

(d) *Charnock's Case*, 12 St. Tr. 1454.

the witness may thus become entitled to the fullest credence (*e*). And still more so if he is found to be confirmed by a variety of collateral and independent facts and circumstances, and to be uncontradicted in any essential particular (*f*). (751)

(4). Should the fact that the witness had been convicted of some offence be elicited from him—that may weigh according to circumstances with the jury; but a witness cannot be compelled to answer—though it seems he may be asked—a question, the reply to which might criminate or tend to criminate him; and the 3rd sect. of the 14 & 15 Vict. c. 99, expressly provides that nothing in that act contained shall render a person compellable to answer any question so tending. A witness may however be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to *answer, the cross-examining party may prove such conviction (*g*). And a [* 460] conviction for crime will not affect the competency of a witness (*h*).

(5). Lastly, in cross-examination, the practice which has long obtained is proper of allowing the accused to call witnesses for the purpose of discrediting the testimony of those who have given evidence for the crown—the question to be asked any such witness being of this kind—would you, from your knowledge of the general reputation of A., believe his statements upon oath? An answer to this question in the negative will be admissible (*i*).

The right to reply where evidence is given for the prisoner or defendant is vested in the counsel for the crown (*k*)—though not usually exercised where witnesses are called to speak merely to the character of the accused (*l*); and if upon the trial of a person for any subsequent felony, not capital, evidence of good character be given, the prosecutor may, in answer thereto, give evidence of the conviction of such person for a previous felony, and the jury will have to inquire concerning such previous conviction at the same time that they inquire concerning the subsequent felony (*m*).

When the evidence and speeches of counsel on both sides are closed, it is for the court to instruct the jury as to matters of law, to read and comment upon

(*e*) See *Despard's Case*, 28 St. Tr. 346.

Lord Tenterden's charge to the grand jury at the trial of Thistlewood, 33 St. Tr. 689; per Lord Ellenborough, C. J., *R. v. Watson*, 32 Id. 583.

In *Winsor's Case*, 6 B. & S. 148, 8 Id. 499, an important point arose touching the evidence of an accomplice. There A. & B. had been jointly indicted for murder, but the jury were by direction of the judge discharged without giving any verdict at the trial. Afterwards A. was tried alone for the murder, and at that trial B., who had neither been acquitted nor convicted on the joint indictment originally found, was admitted as a witness on behalf of the crown against A. This evidence was deemed admissible.

(*f*) *Per Le Blanc, J.*, 31 St. Tr. 1122—8; per Thompson, B., Id. 980—1.

(*g*) 28 & 29 Vict. c. 18, s. 6.

(*h*) 6 & 7 Vict. c. 85, s. 1, which enacts that no person offered as a witness shall be excluded by reason of incapacity from crime from giving evidence on the trial of any issue joined, or any matter, civil or criminal, in any court.

(*i*) *Reg. v. Brown*, 36 L. J. M. C. 59.

(*k*) *Vide* 28 & 29 Vict. c. 18, s. 2, *ad finem*.

(*l*) See *Reg. v. Rowton*, L. & C. 520, as to counter evidence respecting character.

(*m*) 6 & 7 Will. 4, c. 111; see 24 & 25 Vict. c. 99, s. 37.

(751) In most of the United States it is believed to be within the exclusive discretion of the prosecuting officer to determine whether or not an accomplice shall be permitted to become "State's evidence," and whether, if he does, he is afterward entitled to freedom from prosecution, by reason of what is thus done. See *Kinchelow v. State*, 5 Humph. (Tenn.) 9; 1 Bish. Cr. Proc., § 1076, and note. But see *People v. Whipple*, 9 Cow. 707; *Ray v. State*, 1 Greene (Iowa), 316.

the evidence, to clear away difficulties and remove obstacles—in their way towards a satisfactory conclusion. It has been said that the judge at a criminal trial is counsel for the prisoner—but this can only hold at all specifically [* 461] where * the accused is undefended (*n*). In a general and scarcely accurate sense however the court may be spoken of as counsel for the prisoner, inasmuch as upon them devolves the duty of determining as to the competency of witnesses and the admissibility and relevancy of proofs, of determining, moreover, whether any case such as should be submitted to the jury has been made out on the part of the prosecution. It is for the judge to decide whether any evidence, *i. e.* evidence upon which a conviction might safely rest, has been adduced for the crown (*o*); should there be such, he will rehearse it from his notes with such comments as may be deemed appropriate. And for the jury will it be (taking the law from the court) to determine as to facts (*p*). (752)

VIII. When any evidence has been given, the jury cannot be discharged—unless in a case of evident necessity (*q*), respecting the existence of which the judge, in his discretion, must decide (*r*)—till they have given in their verdict, (753) but are to consider of it, and deliver it in, with the same forms, as upon civil causes: only they cannot, in a criminal case which touches life or member, give a privy verdict (*s*). But the judges [* 462] may adjourn * while the jury are withdrawn to confer, and return to receive the verdict in open court. And such public or open verdict may be either general, guilty, or not guilty; or special, setting forth all the circumstances of the case, and praying the judgment of the court, whether,

(*n*) *Vide, per* Lord Holt, at the trial of Cranburne for high treason (8 Will. 3, A. D. 1696), 13 St. Tr. 222, 237.

(*o*) *Reg. v. Smith*, L. & C. 607, shows that if, on the case for the crown being closed, there appear but a mere *scintilla* of evidence, which in the opinion of the court would not suffice to justify or sustain a verdict of "guilty," the jury should be directed to acquit.

(*p*) When a criminal trial cannot be concluded in one day, the court, by its own authority, may adjourn till the next morn-

ing; but the jury must be somewhere kept together, that they may have no communication but with each other. *R. v. Stone*, 6 T. R. 530; *R. v. Hardy*, 24 St. Tr. 418. "It is," however, "very doubtful whether a judge has power to adjourn a case after the jury have retired to consider a verdict." *Winsor v. Reg.* 6 E. & B. 183.

(*q*) Co. Litt. 227; 3 Inst. 110; Fost. 27; *Gould's Case*, Hil. 1764.

(*r*) *Winsor v. Reg.* 6 E. & B. 143; 8 Id. 490; *Reg. v. Newton*, 13 Q. B. 716.

(*s*) 2 Hale, P. C. 300; 2 Hawk. P. C. 439.

(752) It is the right of the defendant to have a full statement of the law from the court; and the neglect to give a full statement, where the jury consequently fall into error, is sufficient reason for reversal. *State v. McDonnell*, 33 Vt. 491; *People v. Dunn*, 1 Idaho, 75; *Hinch v. State*, 25 Ga. 699; *Strady v. State*, 5 Coldw. (Tenn.) 300; *Longnecker v. State*, 22 Ind. 247; *State v. Daubert*, 42 Mo. 243; *Armstead v. State*, 43 Ala. 840. So it is error to leave a matter of law to the jury as a matter of fact. *Com. v. Davis*, 11 Gray (Mass.), 4.

(753) The discharge of a jury in case of necessity does not furnish a bar to a new trial. *State v. Ephraim*, 2 Dev. & Bat. (N. C.) 166; *People v. Goodwin*, 18 Johns. 205; *Com. v. Fells*, 9 Leigh (Va.), 620; *People v. Reagle*, 60 Barb. 527. Sickness of a juror or a member of the court, or of the prisoner, or inability of the jury to agree upon a verdict, or the closing of a term of court before verdict, would be such a necessity. *Id.*; *Com. v. Thompson*, 1 Va. Cas. 319; *State v. Battle*, 7 Ala. 259; *Miller v. State*, 8 Ind. 325; *Wright v. State*, 5 id. 290. For greater caution the grounds of the necessity should be spread on the records. See *McKenzie v. State*, 26 Ark. 334; *Mosely v. State*, 33 Texas, 671; *State v. Evans*, 21 La. Ann. 331; *State v. Redman*, 17 Iowa, 329.

for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they doubt the matter of the law, and therefore choose to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths. (754) But the practice, heretofore in use, of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal (t); and is treated as such by Sir Thomas Smith, two hundred years ago; who accounted "such doings to be very violent, tyrannical, and contrary to the liberty and custom of the realm of England (u)." For, as Sir Matthew Hale well observes (x), it would be a most unhappy case for the judge himself, if the prisoner's fate depended upon his directions:—unhappy also for the prisoner: for, if the judge's opinion must rule the verdict, the trial by jury would be useless.

If the jury find the prisoner not guilty, he is then for ever quit and discharged of the accusation. And upon such his acquittal, or discharge for want of prosecution, he shall be immediately set at large without payment of any fee to the gaoler (y). But if the jury find him guilty, he is then said to be convicted of the crime whereof he stands indicted. Which conviction may accrue two ways; either by his confessing the offence and *pleading [* 463] guilty; or by his being found so by the verdict of his country.

A verdict of "guilty" must rest upon and be supported by the indictment; it must rest either upon the whole indictment or upon some portion of it material in itself and separable from the other portions, or it must be supportable in virtue of some power given to the jury by express enactment (z). An intermediate state between that of entire innocence and guilt, is sometimes also thus evidenced. It may appear conclusively that the accused, though he has failed to commit the crime set forth in the indictment, has nevertheless attempted to commit it. And our law—though declining to concern itself with a bare intention—takes cognisance under divers and dissimilar circumstances of an attempt (a). Whenever the attempt merely is thus indictable the ends of justice require that a jury should be empowered upon an indictment either for felony or for misdemeanor, to convict of the attempt to commit it, and this power was conferred upon them by the 9th sect. of the 14 & 15 Vict. c. 100 (b), which leaves untouched the mode of procedure by indictment for an attempt where it seems that an attempt only was in truth made, and where consequently it would be improper to indict for the criminal act attempted by the accused (c).

(t) *Bushell's Case* and Note thereto, Broom, 72, 88; 14 & 15 Vict. c. 190, s. 12. Arch. Cr. Const. L. pp. 120, 144. Fl. 16th ed. pp. 367, 461.

(u) Smith's *Commonw.* 1, 8, c. 1.

(a) Russ. Cr. 4th ed. i. 88.

(v) 2 Hale, P. C. 313.

(b) See *Reg. v. McPherson*, Dears. & B. 197.

(y) Stat. 14 Geo. 3, c. 20.

(c) *Reg. v. Cheeseman*, L. & C. 140; *Reg. v. Collins*, Id. 471; *Reg. v. Johnson*, Id. 489.

(z) In illustration of the text compare, 24 & 25 Vict. c. 100, ss. 25, 60; c. 96, ss. 41, 54,

(754) The jury have a right in all criminal cases to find a special verdict (*Com. v. Chatham*, 14 Wright [Penn.], 181; *State v. Duncan*, 2 McCord [S. C.], 129; *McGuffie v. State*, 17 Ga. 497; *Com. v. Squires*, 97 Mass. 59); but in the United States such verdicts are rarely found. See *id.* And it is the right of the jury, if they please, to bring in a general verdict of guilty or not guilty instead of rendering a special verdict. *People v. Antonio*, 27 Cal. 404. In Louisiana verdicts can only be "guilty" or "not guilty." *State v. Jurche*, 17 La. Ann. 71.

IX. After trial and conviction (*d*), the judgment of the court, unless suspended or arrested, regularly follows, and at this period "the benefit of clergy," now abolished, was usually claimed.* (755)

Benefit of clergy. [* 464] The *privilegium clericale*, or * "benefit of clergy," had its origin (*e*) from the pious regard paid by Christian princes to the church in its infant state; and the ill use which the popish ecclesiastics soon made of that pious regard. The exemptions granted to the church were principally of two kinds: 1. Exemption of places, consecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries (*f*). 2. Exemption of the persons of clergymen from criminal process before the secular judge in a few particular cases, whence the origin and meaning of the *privilegium clericale*.

But the clergy, increasing in wealth, power, honour, number, and interest, began soon to set up for themselves; and that which they had obtained by the favour of the civil government, they now claimed as their inherent right; and as a right of the highest nature, indefeasible, and *jure divino*. By their canons therefore and constitutions they endeavoured at, and where they met with easy princes obtained, a vast extension of these exemptions: as well in regard to the crimes themselves, of which the list became quite universal: as in regard to the persons exempted, among whom were at length comprehended not only every little subordinate officer belonging to the church or clergy, but even many who were totally laymen.

In England however, although the usurpations of the pope were very many and grievous, till Henry VIII. exterminated his supremacy, yet a total exemption of the clergy from secular jurisdiction could never be thoroughly effected: and therefore, though the ancient *privilegium clericale* was in some capital cases, yet it was * not universally allowed. And in those particular [* 465] cases, the custom was for the bishop or ordinary to demand his clerks to be remitted out of the king's courts, as soon as they were indicted: concern-

(*d*) When, upon a charge of felony, the jury have brought in their verdict "guilty," in the presence of the prisoner; he is either immediately, or at a convenient time soon after, asked by the court, if he has any thing to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemeanor (the trial of which may happen in his absence), a *capias* may be awarded and issued, to bring him in to receive judgment; and, if he absconds, he may be prosecuted even to outlawry.

* By 32 & 33 Vict. c. 99, s. 8, it is enacted that where a person is convicted on indictment of any offence below specified (*a*), and he be proved to have been previously convicted of any such offence, either before or after the passing of this Act, then, in addition to any other punishment which may be

awarded to him, it shall be deemed to be part of the sentence passed on him, unless otherwise declared by the court, that he is to be subject to the supervision of the police for a period of seven years, or such less period as the court may direct, commencing from the time at which he is convicted, and exclusive of the time during which he is undergoing his punishment.

(*a*) Any felony not punishable with death, or the offence of uttering false or counterfeit coin or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or misdemeanor under 24 & 25 Vict. c. 96, s. 58.

(*e*) Respecting which see *per* Treby, C. J., *Trial of the Earl of Warwick*, 13 St. Tr. 1015.
(*f*) *Ante*, p. 425.

(755) The plea of "benefit of clergy" has been recognized in the United States as a part of the common law. See *State v. Kearney*, 1 Hawks (N. C.), 53; *State v. Jernagan*, 3 Murphy (N. C.), 12; *State v. Boon*, 1 Taylor (N. C.), 246; *State v. Sutcliffe*, 4 Strobb. (S. C.) 372; *Com. v. Gable*, 7 Serg. & R. 423; *Com. v. Miller*, 2 Ashm. (Penn.) 61; *Com. v. Posey*, 4 Call (Va.), 109. But see, *contra*, *State v. Bilauksy*, 3 Minn. 246; *Fuller v. State*, 1 Blackf. (Ind.) 63. In most of the States, however, where the plea has been received by the courts, the legislatures have abolished it with few exceptions. *State v. Bosse*, 8 Rich. (S. C.) 276.

ing the allowance of which demand there was for many years a great uncertainty (*g*): till at length it was finally settled in the reign of Henry VI., that the prisoner should first be arraigned; and might either then claim his benefit of clergy, by way of declinatory plea; or, after conviction, by way of arresting judgment.

Originally the law was, that no man should be admitted to the privilege of clergy, but such as had the *habitus et tonsuram clericalem* (*h*). But in process of time a much wider and more comprehensive criterion was established: every one who could read (a mark of great learning in those days of ignorance and her sister superstition) being accounted a clerk or *clericus*, and allowed the benefit of clerkship, though neither initiated in holy orders, nor trimmed with the clerical tonsure. But when learning, by means of the invention of printing, and other concurrent causes, began to be more generally disseminated; and reading was no longer a competent proof of clerkship, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale*: and therefore by statute 4 Hen. 7, c. 13, a distinction was once more drawn between mere lay scholars, and clerks who were really in orders. And though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy; being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly the statute directed that no person once admitted to the benefit of clergy, should be admitted thereto a second time, unless he produced his orders: and, in order to distinguish their * persons, that laymen who were allowed this [* 466] privilege should be burnt with a hot iron in the hand. This distinction between learned laymen and real clerks in orders, was abolished for a time by the statutes 28 Hen. 8, c. 1, and 32 Hen. 8, c. 3, but held (*i*) to have been virtually restored by statute 1 Edw. 6, c. 12, which statute also enacted that lords of parliament and peers of the realm, having place and voice in parliament, might have the benefit of their peerage, equivalent to that of clergy, for the first offence (although they could not read, and without being burnt in the hand), for all offences then clergyable to commoners, and also for some others; but this privilege of peerage was finally abolished by the stat. 7 & 8 Geo. 4, c. 28, s. 6, and stat. 4 & 5 Vict. c. 22.

After burning in the hand the laity, and before it the real clergy, were discharged from the sentence of the law in the temporal courts, and delivered over to the ordinary, to be dealt with according to the ecclesiastical canons. Whereupon the ordinary, not satisfied with the proofs adduced in the profane secular court, set himself formally to work to make a purgation of the offender by a new canonical trial; although he had been previously convicted by his country, or perhaps by his own confession (*k*). This trial was held before the bishop in person, or his deputy; and by a jury of twelve clerks: and there, first, the party himself was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who swore they believed he spoke the truth; then, witnesses were to be examined upon oath, but on behalf of the prisoner only; and lastly, the jury were to bring in their verdict

(*g*) 2 Hale, P. C. 377.

(*h*) 2 Hale, P. C. 372; M. Paris, A. D. 1259.

(*i*) *Searle v. Williams*, Hob. 294; 2 Hale, P. C. 375.

(*k*) Staundford, P. C. 138, b.

upon oath, which usually acquitted the prisoner; otherwise, if a clerk, he was degraded, or put to penance (l).

[* 467] *The scandalous prostitution of oaths and the forms of justice, in the almost constant acquittal of felonious clerks by purgation, was the occasion, that, upon very heinous and notorious circumstances of guilt, the temporal courts would not trust the ordinary with the trial of the offender, but delivered over to him the convicted clerk, *absque purgatione faciendâ*: in which situation the clerk convict could not make purgation; but was to continue in prison during life, and was incapable of acquiring any personal property, or receiving the profits of his lands, unless the crown should please to pardon him. And the stat. 18 Eliz. c. 7, enacted that, for the avoiding of such perjuries and abuses, after the offender had been allowed his clergy, he should not be delivered to the ordinary, as before; but, upon such allowance and burning in the hand, should forthwith be enlarged and delivered out of prison; with proviso, that the judge might, if he thought fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued unaltered, except in some unimportant particulars (m), for above a century.

Afterwards indeed it was considered, that education and learning afforded no extenuation of guilt, but quite the reverse: and that, if the punishment of death for simple felony was too severe for those who had been liberally instructed, it was, *a fortiori*, too severe for the ignorant also. And thereupon by the 5 Ann. c. 6, it was enacted, that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read by way of conditional merit, and by the stat. 19 Geo. 3, c. 74, it was further enacted that instead of burning in the hand (which was sometimes too slight and sometimes too disgraceful a punishment), the court in all clergyable felonies might impose a pecuniary fine; or (except in the case of manslaughter) might order the offender to be whipped; fine or whipping to have the same [* 468] *consequences as burning in the hand; and in this state did the benefit of clergy stand, until it was abolished by the statute 6 & 7 Geo. 4, c. 28, s. 6.

From the preceding detail we collect, that, however in times of ignorance and superstition that monster in true policy may for a while subsist, a body of men, residing in the bowels of a state, independent of its laws; yet, when learning and rational religion have a little enlightened men's mind, society can no longer endure an absurdity so gross, as must destroy its very fundamentals. For, by the original contract of government the price of protection by the united force of individuals is that of obedience to the united will of the community. This united will is declared in the laws of the land; and that united force is exerted in their due and universal execution.

At this period of the trial, viz. between conviction and sentence (n), a defendant who appears in person may offer exceptions to the indictment, in Moving in arrest of judgment. arrest or stay of judgment: as for want of sufficient certainty in setting forth either the person against whom the offence was committed, the time, the place, where material, or the particulars of the

(l) *R. v. Burridge*, 8 P. Wms. 447; *Searle* Will. & M. c. 9; 4 & 5 Will. & M. c. 24; 10 & *v. Williams*, Hob. 289. 11 Will. 3, c. 23.

(m) See the stats. 21 Jac. 1, c. 6; 3 & 4 (n) 32 Geo. 3, c. 60, s. 4.

offence itself. And if such objections be valid, the whole proceedings will be set aside; though the party may be again indicted (*o*). (756)

A pardon also may be pleaded in arrest of judgment. And when a man has obtained a pardon from the crown, it is a rule that he should plead it as soon as possible (*p*).
Pardon.

If these resources fail, the court will proceed to pass sentence, and must pronounce (*q*) that judgment (*r*), * which in one or other of the preceding chapters has been specified as annexed by law to the offence. [* 469]

It is indeed one of the glories of our English law, that the species, though not always the quantity or degree of punishment is ascertained for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates; and would live in society, without knowing exactly the conditions and obligations under which it lays them. Moreover, as this prevents oppression on the one hand, so on the other it stifles hopes of impunity or mitigation; with which an offender might flatter himself, if his punishment depended on the humour or discretion of the court. Whereas, where an established penalty is annexed to a crime, the criminal may read its certain consequence in that law; which ought to be the unvaried rule, as it is the inflexible judge, of his actions. Even a voluntary forgiveness, by the party injured, ought not in true policy to intercept the stroke of justice. "This," it has been * said (*s*), "may be an act of good nature and humanity, but it is contrary to the good of the public. For, although a private citizen may dispense with satisfaction

(*o*) 4 Rep. 45.

(*p*) 1 Chitt. Cr. L. 466; *R. v. Norris*, 1 Roll. Rep. 297.

(*q*) On conviction for a capital offence, except high treason and murder, the statute 4 Geo. 4, c. 48, s. 1, enables the court to direct judgment of death to be recorded against the offender, instead of pronouncing it. See also the 1 Vict. c. 77, s. 8, as to the Central Criminal Court.

(*r*) The statute 11 Geo. 4 & 1 Will. 4, c. 70, s. 9, enacts, that upon any trial for felony or misdemeanor, upon any record of the court of queen's bench, judgment may be pronounced during the sittings or assizes, by the judge before whom the verdict is taken, as well where the defendant has suffered judgment by default or confession, as where he has been tried and convicted, whether he be present or not in court (except only where

the prosecution is by information filed by leave of the court of queen's bench, or where on an information filed by the attorney-general, the judgment may on his application be postponed); and the judgment so pronounced shall be indorsed upon the *nisi prius* record, and afterwards entered upon the record in court, and shall be of the same force and effect as a judgment of the court, unless the court shall, within six days after the commencement of the ensuing term, grant a rule to show cause why a new trial should not be had, or the judgment be amended; and the judge before whom the trial is had, may either issue an immediate order or warrant for committing the defendant in execution, or may respite the execution of the judgment until the sixth day of the ensuing term.

(*s*) Becc. ch. 46.

(756) Judgment can only be arrested for matter appearing on the record (*State v. Carver*, 49 Me. 588; *Com. v. Watts*, 4 Leigh [Va.], 673; *State v. Connell*, 49 Mo. 282); but the motion is not confined to the indictment alone. Thus it obtains, if any part of the record is imperfect, repugnant, or vicious. *State v. Fort*, 1 Car. Law Rep. 510; *Whitehurst v. Davis*, 2 Hayw. 113. See *Com. v. Call*, 21 Pick. (Mass.) 509.

For the purpose of compelling parties under the indictment to take their objections more promptly than is required by the rules of the common law, these rules have been variously modified by statutes in some of the United States. And under these statutes it is held that technical irregularities in pleading can no longer be considered ground for motions in arrest. See, generally, *Cowman v. State*, 12 Md. 250; *State v. Raymond*, 20 Iowa, 582; *Wise v. State*, 24 Ga. 81; *Walston v. State*, 16 B. Monr. (Ky.) 15; *Camp v. State*, 25 Ga. 689.

for his private injury, he cannot remove the necessity of public example. The right of punishing belongs not to any one individual in particular, but to the society in general, or the sovereign who represents that society: and a man may renounce his own portion of this right, but he cannot give up that of others."

Referring to the earlier portions of this volume for the punishment attached to each specific offence by our law, some general remarks respecting judicial sentences may here be offered.

Wherever sentence is passed for felony on a person already imprisoned under sentence for another crime, the court may award imprisonment for the subsequent offence, to commence at the expiration of the previous imprisonment; and where the party is already under sentence of imprisonment or penal servitude, the court may award punishment for the subsequent offence; to commence at the expiration of the previous sentence, although the aggregate term of imprisonment or penal servitude may exceed the term for which either of those punishments could be otherwise awarded (*t*).

In the case of a felony punishable under any one of the Criminal Law Consolidation and Amendment Acts, a principal in the second degree and an accessory before the fact is punishable in like manner as a principal in the first degree (*u*).

An accessory after the fact to murder is punishable with penal servitude for life or not less than five years, or with imprisonment for not more than two years with or without hard labour (*x*).

* An accessory after the fact to any other felony (*y*) punishable [* 471] under one of the acts above mentioned, may be sentenced to imprisonment for any term not exceeding two years with or without hard labour: and in certain cases with or without solitary confinement (*z*).

Whoever counsels or aids the commission of an indictable misdemeanor punishable under any of the said acts, is punishable as a principal offender (*a*).

Further, with reference to the sentence which may be passed upon a person who has been convicted of an indictable offence under any of the last-mentioned acts, it is provided that:—

1. Whenever imprisonment, with or without hard labour, may be awarded for such offence, the court may sentence the offender to be imprisoned in the common gaol or house of correction (*b*).

2. Whenever solitary confinement may be awarded for such offence, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, not exceeding one month at any one time, and not exceeding three months in any one year (*c*).

3. Whenever whipping may be awarded for any such offence, the court may sentence the offender to be once privately whipped; and the number of strokes, and the instrument with which they are to be inflicted, shall be specified in the sentence by the court (*d*).

The discretionary fines which our courts are sometimes enabled to impose,

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| (<i>t</i>) 7 & 8 Geo. 4, c. 28, s. 10. | (<i>a</i>) 24 & 25 Vict. c. 96, s. 98; c. 97, s. 56; c. 98, s. 49; c. 100, s. 67. |
| (<i>u</i>) 24 & 25 Vict. c. 96, s. 98; c. 79, s. 56; c. 98, s. 49; c. 99, s. 35; c. 100, s. 67. | (<i>b</i>) 24 & 25 Vict. c. 96, s. 118; c. 97, s. 74; c. 98, s. 53; c. 99, s. 39; c. 100, s. 69. |
| (<i>x</i>) 24 & 25 Vict. c. 100, s. 67. | (<i>c</i>) 24 & 25 Vict. c. 96, s. 119; c. 97, s. 75; c. 98, s. 53; c. 99, s. 40; c. 100, s. 70. |
| (<i>y</i>) Except the receiving of stolen property. | (<i>d</i>) 24 & 25 Vict. c. 96, s. 119; c. 97, s. 75; c. 100, s. 70. |
| (<i>z</i>) 24 & 25 Vict. c. 96, s. 98; c. 97, s. 56; c. 98, s. 49; c. 99, s. 35; c. 100, s. 67. | |

may seem an exception to the rule before stated, that punishment should be fixed and *determinate: the amount of a fine, however, may properly vary according to the aggravations or otherwise of the offence, the [* 472] quality and condition of the parties, and from other circumstances. It neither can, nor ought to, be ascertained by any invariable law. The value of money itself changes from a thousand causes: and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's (e). Our statute law has not therefore often ascertained the quantity of fines; for instance, we have already seen that when any person has been convicted of an indictable misdemeanor punishable under any of the Criminal Law Consolidation and Amendment Acts (f), the court may, in addition to, or in lieu of, any punishment by the particular act authorised, inflict a fine upon the offender, the amount or limit whereof has not been determined by the legislature. Neither does the common law affix a precise limit to the pecuniary mulct which, as in the case of a misdemeanor, it sometimes allows to be imposed: it directs such an offence to be punished by fine in general, without specifying the certain sum: and this is sufficient, when we consider, that however unlimited the power of the court may seem, it is far from being wholly arbitrary; but its discretion is regulated by law. For the Bill of Rights (g) has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings in the court of king's bench, in the reign of king James the Second:) and the same statute further declares, that all grants and promises of fines and forfeitures of particular persons before *conviction, are illegal and void. Now the Bill of Rights was only declaratory of the old consti- [* 473] tutional law: and accordingly we find it expressly holden, long before (h), that all such previous grants are void; since thereby many times undue means, and more violent prosecution, might be used for private lucre, than the quiet and just proceeding of law would permit.

The reasonableness of fines in criminal cases has also been generally regulated by the determination of *Magna Carta*, c. 14, concerning amercements for misbehaviour by the suitors in matters of civil right. "*Liber homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti; salvo contemnento suo: et mercator eodem modo, salva mercandis suis; et villanus eodem modo amercietur, salvo wainagio suo.*" A rule that obtained even in Henry the Second's time (i), and means only, that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: saving to the landholder his contenment (k), or land: to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry. In order to

(e) Thus the law of the twelve tables at Rome fined every person, who struck another, five and twenty *denarii*; this, in the more opulent days of the empire, grew to be a punishment of so little consideration, that Aulus Gellius tells a story of one Lucius Neratius, who made it his diversion to give a blow to whomsoever he pleased, and then tender him the legal forfeiture.

(f) 24 & 25 Vict. c. 96, s. 117; c. 97, s. 73; c. 98, s. 51; c. 99, s. 88; c. 100, s. 71.

(g) Stat. 1 Will. & M. st. 2, c. 2.

(h) 2 Inst. 48.

(i) Glanv. l. 9, cc. 8 & 11.

(k) Lord Coke says, that contenment signifieth his countenance, as the armour of a soldier is his countenance, the books of a scholar his countenance, and the like. 2 Inst. 28. He also adds, that the *wainagium* is the countenance of the villain, and it was great reason to save his wainage, for otherwise the miserable creature was to carry the burden on his back. Ibid.

ascertain which, the great charter directed that the amercement should be *set, ponatur*, or reduced to a certainty, by the oath of good and lawful men of the neighbourhood. Which method, of liquidating the amercement to a precise sum, was usually performed in the superior courts by the assessment or *affeerment* of the coroner, a sworn officer chosen by the neighbourhood, under the equity of the statute Westm. 1, c. 18; and then the judges estreated [*474] * the amount into the exchequer (*l*). But in the court-leet and court-baron it was performed by *affeerors*, or suitors sworn to *affeere*, that is, tax and moderate the general amercement according to the particular circumstances of the offence and the offender (*m*). Amercements imposed by the superior courts on their own officers and ministers were affected by the judges themselves; but when a pecuniary mulct was inflicted on them by a stranger (not being party to any suit), it was then denominated a fine (*n*); and the ancient practice was, when any such fine was imposed, to inquire by a jury "*quantum inde regi dare valeat per annum, salvâ sustentatione suâ, et uxoris, et liberorum suorum*" (*o*). And since the disuse of such inquest, it was never usual to assess a larger fine than a man might be able to pay, without touching the implements of his livelihood: but to inflict corporal punishment, or a limited imprisonment, instead of such fine as might amount to imprisonment for life. And this is the reason why fines in the superior courts were frequently denominated ransoms, because the penalty must otherwise have fallen upon a man's person, unless it were redeemed or ransomed by a pecuniary fine (*p*): according to an ancient maxim, *qui non habet in crumendâ luat in corpore*.

Under the Larceny Act (*q*) the court before which an offender is tried and convicted for any such felony or misdemeanor, as therein mentioned, is empowered to award restitution (*r*) to the owner of the property stolen, or wrongfully got from him (*s*), and this is usually done by an order of the court without any writ of restitution (*t*). Also by the 30 & 31 Vict. c. 35, s. 9, it [*475] has been provided * that where a prisoner is convicted of larceny or other offence, which includes the stealing of property, and it appears that the prisoner has sold the stolen property to some person who had no knowledge that the same was stolen, the court may, on the application of such purchaser, and on restitution of the stolen property to the prosecutor, order that out of any money, which may have been taken from the prisoner on his apprehension, a sum not exceeding the amount of the proceeds of the said sale be delivered to the purchaser (*u*).

We have seen that, under certain circumstances, the prosecutor may, on

(*l*) F. N. B. 76.

(*m*) The affeeror's oath was conceived in the very terms of *Magna Carta*. Fitz. Survey, c. 11.

(*n*) 8 Rep. 40.

(*o*) Gilb. Exch. c. 5.

(*p*) Mirr. c. 5, s. 8; Lamb. Eirenarch. 575.

(*q*) 24 & 25 Vict. c. 96.

(*r*) At common law there was no restitution of goods upon an indictment, as being at the suit of the crown. 3 Inst. 242.

(*s*) *Ante*, p. 146.

(*t*) The owner's property in the goods stolen is re-vested on conviction, notwithstanding a sale of them in market overt. *Scattergood v. Sylvester*, 15 Q. B. 506. And though this may

seem hard upon the buyer, yet the rule of law is "*spoliatus debet, ante omnia, restitui*," especially when the prosecutor has used all the diligence in his power to convict the thief. And since the case is reduced to this hard necessity, that either the owner or the buyer must suffer; the law prefers the right of the owner, who has done a meritorious act by pursuing a felon to condign punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction.

(*u*) The court cannot otherwise direct disposal of chattels in possession of a convicted felon not belonging to the prosecutor. *Reg. v. Pierce*, Bell, C. C. 235.

acquittal of the accused, be adjudged to pay the costs incurred by him (x). So, on the other hand, upon a conviction for assault, whether with or without cutting and wounding or either of them, the person convicted may, in addition to any sentence which the court may deem proper for the offence, be adjudged to pay the prosecutor the actual and necessary expenses of the prosecution, and such moderate allowance for the loss of time as the court shall ascertain to be reasonable (y).

In a case of felony the court is further empowered by the 7 Geo. 4, c. 64, s. 22, to order payment to the * prosecutor of the costs and expenses incurred [* 476] by him in preferring the indictment, and also payment to the prosecutor and his witnesses of such sums of money as may seem reasonable and sufficient to reimburse them for the expenses they have severally incurred in attending before the examining magistrate and grand jury, and in otherwise carrying on the prosecution, and to compensate them for their trouble and loss of time therein. By the 23rd section of the same statute, as amended and extended by the 14 & 15 Vict. c. 55, ss. 2, 3, a similar power is given to the court in many cases of misdemeanor (z).

The witnesses for the accused, who appear on recognizance to give evidence on his behalf at a trial for any felony or misdemeanor, may likewise receive reasonable compensation for their expenses, trouble, and loss of time, by order of the court (a).

Further, the court before which an indictable misdemeanor against any of the undermentioned acts is tried may allow the costs of the prosecution in the same manner as in cases of felony (b). And in any prosecution for an offence against the Coinage Act, conducted under the direction of the treasury, the court before which such offence is tried shall allow the expenses of the prosecution as in a case of felony; and if such prosecution be not so conducted, the court has a discretionary power in case a conviction takes place, but not otherwise, in like manner to allow the expenses of the prosecution (c).

Besides the powers thus conferred upon the court, it is authorised by statute in certain cases to order the payment of money by way of compensation for expenses, * exertions, and loss of time, to any person who may appear to have been active in or towards the apprehension of the pris- [* 477] oner (d). (757)

(x) *Ante*, p. 402.

As to the power of the Central Criminal Court to order payment of the expenses of a person acquitted, see 19 & 20 Vict. c. 16, s. 26.

(y) 24 & 25 Vict. c. 100, ss. 74, 75.

(z) By the stat. 1 Vict. c. 44, a like power is given to the court, in prosecutions for endeavouring to conceal the birth of a child.

(a) 80 & 81 Vict. c. 85, s. 5.

(b) 24 & 25 Vict. c. 96, s. 121; c. 97, s. 77; c. 98, s. 54; c. 100, s. 77.

(c) 24 & 25 Vict. c. 99, s. 42.

As to the Central Criminal Court, see 19 & 20 Vict. c. 16, ss. 13, 25.

(d) 7 Geo. 4, c. 64, ss. 28—30; a like power is conferred on the Central Criminal Court by the 19 & 20 Vict. c. 16, s. 18, and on the Court of Sessions of the Peace by the 14 & 15 Vict. c. 85, s. 8.

(757) According to some American authorities evidence that the defendant was asked if he had any thing to say why sentence should not be pronounced, must appear on record in a capital case. *Dougherty v. Com.*, 69 Penn. 286; *Graham v. People*, 63 Barb. 468; 6 Lans. 149; *James v. State*, 45 Miss. 572; *Crocker v. State*, 47 Ala. 53; *People v. Safford*, 1 Park. 474. But see *State v. Johnson*, 67 N. C. 55; *State v. Ball*, 27 Mo. 324; *Jeffries v. Com.*, 13 Allen (Mass.), 145. In all cases of corporal punishment the defendant's presence at the sentence is requisite. *Dougherty v. Com.*, 69 Penn. St. 286; *State v. Hurlbut*, 1 Root (Conn.), 90; *Peters v. State*, 39 Ala. 681; *Sneed v. State*, 5 Pike (Ark.), 431. But where the punish-

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* CHAPTER XX.

PROCEEDINGS AFTER THE TRIAL.

THE proceedings subsequent to trial arrange themselves under two heads:—
 I. Such as are taken for avoiding, reversing, or setting aside the judgment.
 II. Such as are consequential thereupon.

I. We will first briefly consider how the judgment in a criminal case may be set aside. There are several ways of doing this, which we will examine, first referring the reader to what has been already said (a) respecting the jurisdiction of the court of criminal appeal upon a case reserved at the trial for its consideration.

1. Where the indictment has been preferred in the court of queen's bench, or where it has been removed thither by *certiorari*, a new trial will be granted

(a) *Ante*, p. 349.

ment is simply a fine, absence has been allowed. *People v. Winchell*, 7 Cow. 525; *Son v. People*, 12 Wend. 344; *Price v. State*, 36 Miss. 531; *Hamilton v. Com.*, 4 Harr. (Penn.) 139.

A sentence may be amended or altered at any time during the term of the court at which it is rendered (*Com. v. Weymouth*, 2 Allen [Mass.], 144. See *Jobe v. State*, 28 Ga. 235; *Master of Mason*, 8 Mich. 70); and every court of general criminal jurisdiction has power to respite or suspend its sentence after it is pronounced, and before it is executed. See *Fruits v. State*, 2 Sneed (Tenn.), 233; *Allen v. State*, Mart. & Yerg. 294; *Miller's Case*, 9 Cow. 730.

When a general verdict of guilty is rendered upon several counts in an indictment, relating to the same transaction, the practice is to pass judgment on the highest grade of offense. *Harmon v. Com.*, 12 Serg. & R. (Penn.) 191; *Conkey v. People*, 5 Park. 81; S. C., 1 Abb. Ct. App. 418; *Manly v. State*, 7 Md. 135. If part of the counts are bad, judgment should be pronounced only on the good counts (*id.*; *State v. Brown*, 3 Strobb. (S. C.) 508; *Wash v. State*, 14 Sm. & M. [Miss.] 120); though judgment passed on the whole indictment in such case will not be erroneous if there is sufficient of good allegation to sustain the judgment. *State v. Watson*, 31 Mo. 361; *Boose v. State*, 10 Ohio, 575; *State v. Stebbins*, 29 Conn. 463; *People v. McKinney*, 10 Mich. 54. It will be error, however, if the sentence exceeds that which could have been given on the good counts. *State v. Bean*, 21 Mo. 269; *Wilson v. People*, 24 Mich. 410. That the sentence is less than could have been imposed is no ground for reversal, provided the punishment be within the legal range. *Kane v. People*, 8 Wend. 205; *Dodge v. State*, 4 Zab. (N. J.) 455; *Haskins v. State*, 27 Ind. 470; *State v. Evans*, 23 La. Ann. 525; *Haney v. State*, 5 Wis. 529.

By the common law, as modified in American practice, the usual punishments imposed in cases not capital are fine and imprisonment; and when an offense is created by statute, without a penalty being assigned, fine and imprisonment are the penalties to be imposed. *Res. v. De Longchamps*, 1 Dall. 111; *United States v. Coolidge*, 1 Gallis. 438. By a statute of the United States a fine or penalty imposed as "a judgment or sentence" against any person in criminal cases "shall be declared a judgment debt, and (unless pardoned or remitted by the president) may be collected on execution in the common form of law." Act of Feb. 20, 1863. U. S. Revised Statutes, 192, § 1041, authorizes the collection in like manner as judgments in civil cases are enforced. Similar statutes are in force in some of the States, and the practice has been held to exist at common law. *Strafford v. Jackson*, 14 N. H. 16; *Kane v. People*, 8 Wend. 203; *Beasley v. State*, 2 Yerg. (Tenn.) 481. The escape of a prisoner committed for the non-payment of his fine does not discharge the judgment. *State v. Simpson*, 1 Jones (N. C.), 80. Nor is it any ground for the discharge of the prisoner that he is poor and unable to pay. *Luckey v. State*, 14 Texas, 400.

by that court in a case of misdemeanor or even of felony—as for misdirection or surprise (*b*), or the improper admission of evidence (*c*)—to further the ends of justice. But after acquittal on a charge of felony, or (with certain peculiar exceptions (*d*)) of misdemeanor, a new trial will not be granted (*e*). (758)

*2. For defects of substance (*f*) apparent on the face of it, the judgment may be reversed by writ of error (*g*); which lies from all [*479] inferior criminal jurisdictions to the court of queen's bench, and

2. Writ of error. from the queen's bench to the court of exchequer chamber, and thence to the house of lords. It may be brought for notorious mistakes in the judgment or other parts of the record: as where a man found guilty of perjury receives the judgment of felony.

These writs of error, to reverse judgments in cases of felony or misdemeanor, are not to be allowed of course (*h*), but, on sufficient probable cause shown to the attorney-general, on his fiat (*i*); and then they are understood to be grantable of common right, and *ex debito justitiæ*. Such a writ if sued out collusively will be set aside (*k*).

Formerly, where the judgment in a criminal case was reversed by the court of queen's bench on writ of error from an inferior court, the court was bound to discharge the prisoner, and could not remit the record to the court below, that the proper sentence might be pronounced there. But now on reversing judgment, the court of error will pronounce the proper judgment, or will remit the record to the court below, in order that such judgment may be there pronounced (*l*).

During the pendency of the writ of error, the defendant in a case of treason or felony, remains in custody, being in execution on the judgment (*m*). But in a case of misdemeanor, the execution will be stayed, and the defendant will be discharged from custody on entering *into recognizances to [*480] prosecute the writ of error with effect and personally to appear in the court wherein such writ may be returnable on the day when judgment is given thereupon (*n*).

(b) *Reg. v. Whitehouse*, Dears. 1.

(c) *Reg. v. Scalfie*, 17 Q. B. 238.

(d) As if the verdict were obtained by fraud of the defendant, or was instituted purely to raise a question of civil right. *Reg. v. Russell*, 3 E. & B. 942, 950.

(e) *Reg. v. Russell*, *supra*.

Where there has been a mistrial, the court will award a *venire de novo*. *Reg. v. Yeadon*, L. & C. 81.

(f) *Ante*, pp. 411, 428.

(g) As to the history and nature of writs of

error in criminal cases, see *R. v. Wilkes*, 4 Burr. 2550; 1 Chitt. Cr. L. 746, *et seq.*

(h) See *Crawle v. Crawle*, 1 Vern. 170.

(i) See *Mansell v. Reg.*, 8 E. & B. 54; *Ex parte Newton*, 4 Id. 869.

(k) *Alleyne v. Reg.*, 5 E. & B. 899; *Reg. v. Alleyne*, 4 Id. 186.

(l) 11 & 12 Vict. c. 78, s. 5; *Holloway v.*

Reg., 2 Den. C. C. 287.

(m) Arch. Cr. Pl., 16th ed. p. 182.

(n) 16 & 17 Vict. c. 32, amending 8 & 9 Vict. c. 68.

(758) In misdemeanors it is well settled that a defendant may have a new trial in the discretion of the court after conviction. *Com. v. Green*, 17 Mass. 513; *U. S. v. Gilbert*, 2 Sumner, 19; *State v. Prescott*, 7 N. H. 287; *People v. Comstock*, 8 Wend. 549; *State v. Slack*, 1 Bailey (S. C.), 330; *People v. Vermilyea*, 7 Cow. 869. And new trials have been granted after convictions of every grade of crime. See *Com. v. Clus*, 3 Rawle (Penn.), 500; *Com. v. Brown*, id. 207; *Com. v. Murray*, 2 Ashm. (Penn.) 41; *State v. Greenwood*, 1 Hayw. (N. C.) 141; *State v. Douglass*, 63 N. C. 500; *Cassels v. State*, 4 Yerg. (Tenn.) 152; *State v. Crawford*, 2 id. 66; *State v. Hopkins*, 1 Bay (S. C.), 373; *Com. v. Green*, 17 Mass. 515; *Com. v. Jones*, 1 Leigh (Va.), 598; *State v. Slack*, 6 Ala. 676; *Cobia v. State*, 16 id. 781.

A judgment reversed upon writ of error is the same in contemplation of law as no judgment, and the defendant may be again indicted (*o*). (759)

3. A judgment may be falsified, reversed, or avoided, without a writ of error, for matters foreign to or *dehors* the record, that is, not apparent upon the face of it; so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself: and therefore, if the whole record be not certified, or not truly certified, by the inferior court, the party injured thereby (in both civil and criminal cases) may allege a diminution of the record (*p*), and cause it to be rectified. Thus, if any judgment whatever be given by persons, who had no good commission to proceed against the person condemned, it is void; and may be falsified by showing the special matter without writ of error. *Ex gr.*, if a commission issues to A. and B., and twelve others, or any two of them of whom A. or B. shall be one, to take and try indictments; and any of the other twelve proceed without the interposition or presence of either A. or B.: in this case all proceedings, trials, convictions, and judgments are void for want of a proper authority in the commissioners, and may be falsified upon bare inspection without the trouble of a writ of error (*q*); it being a high misdemeanor in the judges so proceeding, and little (if anything) short of murder in them all, in case the person so attainted be executed and suffer death.

4. An attainder may be reversed by act of parliament, * and this [* 481] has been sometimes done, from motives of compassion, or perhaps through the zeal of the times, after a sudden revolution in the government, without examining too closely into the truth or validity of the errors assigned. Sometimes, though the crime has been universally acknowledged and confessed, yet the merits of the criminal's family have after his death obtained a restitution in blood, honours, and estate, or some, or one of them, by act of parliament; which (so far as it extends) has all the effect of reversing the attainder, without casting any reflections upon the justice of the preceding sentence (*r*).

The effect of reversing an outlawry, is that the party shall be in the same plight as if he had appeared upon the *capias*; and, if it be before plea pleaded, he shall be put to plead to the indictment; if after conviction, he shall receive the sentence of the law: for all the other proceedings, except only the process of outlawry for his non-appearance, remain good and effectual as before. But

(*o*) *Reg. v. Drury*, 3 C. & K. 193, 199.

(*p*) See Toml. L. Dict. *sub verb.* "Diminution."

(*q*) 2 Hawk. P. C. 459; 8 Inst. 231; 1 Hale, P. C. 361.

(*r*) This was done with respect to the forfeited estates in Scotland, by stat. 24 Geo. 3, c. 57.

(759) Writ of error in the United States is to a great extent regulated by statutes which vary in the different States. In some of the States it can be employed only when allowed by the attorney-general or by the court. See *Baker v. Com.*, 2 Va. Cas. 353; *Com. v. Proffit*, 4 Binn. (Penn.) 424; *Lavett v. People*, 7 Cow. 339; *Miles v. Rempublicam*, 4 Yeates (Penn.), 319; *Farris v. State*, 1 Ohio St. 188. But it seems that in Maryland and Missouri the writ can issue without a special *allocatur*. *State v. Buchanan*, 5 Harr. & J. 317, 363; *Mitchell v. State*, 3 Mo. 283; *Colloway v. State*, 1 id. 211.

Writ of error does not lie until final judgment (*Jenks v. State*, 16 Wis. 332; *People v. Nestle*, 19 N. Y. [5 Smith] 583; *Loftin v. State*, 11 Sm. & M. 358); and it lies only to courts of record. *Com. v. Simpson*, 2 Grant (Penn.), 438; *Wilde v. Com.*, 2 Metc. (Mass.) 408; *John v. State*, 1 Ala. 95; *Ex parte Tarlton*, 2 id. 35.

when judgment, pronounced upon conviction, is reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood, and his estates: with regard to which last, though they be granted away by the crown, yet the owner may enter upon the grantee, with as little ceremony as he might enter upon a disseisor (*s*). But he still remains liable to another prosecution for the same offence; for, the first being erroneous, he never was in jeopardy thereby (*t*).

The only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

5. A reprieve (*u*), from *repandre*, to take back, is the * withdrawing [* 482] of a sentence for an interval of time; whereby its execution is suspended. This may be, first, *ex mandato regis*, or from the mere pleasure of the crown, expressed to the court by whom the execution is to be awarded; secondly, *ex arbitrio judicis*; either before or after judgment: as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient; or sometimes, if favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or a conditional pardon.

Reprieves may also be *ex necessitate legis*: as, where a woman is capitally convicted, and pleads her pregnancy (*x*); though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, *in favorem prolis*; and, in case this plea be made in stay of execution, the judge must direct a jury of twelve matrons, who are assisted by a surgeon, to inquire as to the alleged fact: and if they bring in their verdict quick with child, execution will be stayed generally till either she is delivered, or proves by the course of nature not to have been with child. Another ground for a reprieve already treated of may be insanity (*y*).

6. If no special reason can be adduced to avoid the judgment or to stay the execution of it, the last and surest resort is to the crown for pardon; the granting of which is indeed its most amiable prerogative. Law cannot be framed on principles of compassion to guilt: yet justice, by the constitution of England, is to be administered in mercy; this was promised by the sovereign in her coronation oath. The queen herself condemns no man; that rugged task she leaves to her courts of justice: * the great operation of her sceptre is mercy. The power of pardoning [* 483] inherent in the sovereign was said by our Saxon ancestors (*z*) to be derived *a lege suæ dignitatis*: and it is enacted by statute 27. Hen. 8, c. 24, s. 1, that no other person shall have power to pardon or remit any treason or felony whatsoever: but that the king shall have the whole and sole power and authority thereof, united and knit to the imperial crown of this realm.

This is indeed one especial advantage of monarchy as a form of government, that there is a magistrate, who has it in his power to extend mercy wherever it is found to be deserved, and to soften the rigour of the general law, in any

(s) 2 Hawk. P. C. 462.

(t) Broom, Leg. Max. 4th ed. 841.

(u) 3 Hale, P. C. 412; 1 Id. 868; Hawk. b. 2, c. 51, s. 8.

(x) It is usual for the clerk of assize to ask women, who receive sentence of death, if

they have any thing to say why execution shall not be awarded according to the judgment.

(y) *Ante*, pp. 22—24.

(z) Leg. Edw. Conf. c. 18.

such criminal case as may merit an exemption from punishment. Pardons (according to some theorists (*a*)) should be excluded in a perfect legislation, where punishments are mild but certain: for the clemency of the prince seems tacitly to imply a disapprobation of the laws. But the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by its spirit instead of its letter (*b*): or else it must be held, which no man would seriously maintain, that the situation and circumstances of the offender (though they alter not the essence of the crime) ought to make no distinction in the punishment.

In a pure democracy this power of pardoning cannot subsist; for there nothing higher is acknowledged than the magistrate who administers the laws: and it would be impolitic for the power of judging and of pardoning to centre in one and the same person. This would oblige him very often to contradict himself, to make and to unmake his decisions: it would tend to confound all ideas of right among the mass of the people; as they would find it difficult to tell, whether a prisoner were discharged by his innocence, or obtained a pardon through favour (*c*). But in a monarchy the king acts in a superior sphere; * and, though theoretically he regulates the whole government, yet [* 484] he does not appear in any of the disagreeable or invidious parts of it. Whenever the public sees him personally engaged, it is only in works of legislation, magnificence, or compassion. To him therefore the people look up as the fountain of nothing but bounty and grace; and these repeated acts of goodness, coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that filial affection, and personal loyalty, which are the surest establishment of a prince.

Under the head of pardon, let us very briefly consider, (1) The object of pardon: (2) The manner of pardoning, and extent of pardon: (3) The method of allowing a pardon: (4) The effect of a pardon when allowed.

(1) The crown may pardon any offence merely against itself or the public; excepting, that to preserve the liberty of the subject, the committing any man to prison out of the realm, is by the *Habeas Corpus* act, 31 Car. 2, c. 2, made a *præmunire*, unpardonable even by the sovereign. Nor can the crown pardon, where private justice is principally concerned in the prosecution of offenders: "*non potest rex gratiam facere cum injuriâ et damno aliorum* (*d*)."
Neither can the crown pardon the person guilty of maintaining a common nuisance, while it remains unredressed, or so as to prevent an abatement of it, but the fine it seems may be remitted; because, though the prosecution is vested in the crown to avoid multiplicity of suits, yet (during its continuance) this offence savours more of the nature of a private injury to each individual in the neighbourhood, than of a public wrong (*e*). Neither, lastly, can the crown (in general) pardon an offence against a penal statute, after information laid (*f*): for thereby the *informer has acquired an inchoate property [* 485] in his part of the penalty (*g*).

There is also a restriction of a peculiar nature, which affects the prerogative

(*a*) Beccar. ch. 46.

(*b*) *Ib.* ch. 4.

(*c*) Montesq. Sp. L. bk. 6, c. 5.

(*d*) 8 Inst. 236; Broom, Leg. Max. 4th ed. p. 64.

(*e*) 2 Hawk. P. C. 891.

(*f*) 1 Chitt. Cr. L. 2nd ed. p. 768.

(*g*) 3 Inst. 238.

of pardoning, in the case of a parliamentary impeachment: viz. that a pardon by the crown cannot be pleaded to any such impeachment, so as to impede the inquiry, and stop the prosecution of a great and notorious offender. Therefore when, in the reign of Charles II., the earl of Danby was impeached by the house of commons of high treason, and other misdemeanors, and pleaded the king's pardon in bar of the same (*h*), the commons alleged (*i*), "that there was no precedent that ever any pardon was granted to any person impeached by the commons of high treason, or other high crimes, depending the impeachment;" and thereupon resolved (*k*), "that the pardon so pleaded was illegal and void, and ought not to be allowed in bar of the impeachment of the commons of England;" for which resolution they assigned (*l*) this reason to the house of lords, "that the setting up a pardon to be a bar of an impeachment defeats the whole use and effect of impeachments; for should this point be admitted, or stand doubted, it would totally discourage the exhibiting any for the future; whereby the chief institution for the preservation of the government would be destroyed." Soon after the revolution, the commons renewed the same claim, and voted (*m*), "that a pardon is not pleadable in bar of an impeachment." And at length, it was enacted by the act of settlement, 12 & 13 Will. 3, c. 2, "that no pardon under the great seal of England be pleadable to an impeachment by the commons in parliament." But, when the impeachment has been solemnly heard and determined, it is not understood that the royal grace is further *restrained or abridged; thus, after the impeachment [* 486] and attainder of the six rebel lords, A. D. 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon (*n*). Moreover, when the lords have delivered their sentence of guilty, the commons have virtually the power of pardoning the impeached convict, by refusing to demand judgment against him, for no judgment can be pronounced by the lords till it is demanded by the commons (*o*).

(2). A pardon may either be absolute or conditional: that is, the queen may extend her mercy upon what terms she pleases; and may annex to her bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend; and this prerogative is not unfrequently

(*h*) Proceedings against the Earl of Danby, 11 St. Tr. 599.

(*i*) Com. Journ. 28 Apr. 1679.

(*k*) *Ib.* 5 May, 1679.

(*l*) *Ib.* 26 May, 1679.

(*m*) *Ib.* 6th June, 1689.

(*n*) The royal prerogative of pardoning a delinquent convicted on impeachment is acknowledged by the commons and asserted by the crown in the following remarkable record:—*Item prie la commune a nostre dit seigneur le roi que nul pardon soit grants a nully persone, petit ne grande, q'ont este de son conseil et serementez, et sont empeschez en cest present parlement de vie ne de membre, fyn ne de raunceon, de forfaiture des terres, tenemens, biens, ou chateaux, lequeux sont ou seront trovez en aucun defect encontre leur ligeance, et la tenure de leur dit serement: mais q'ils ne seront jammes conseillers ne officiers du roi, mais en tout oustez de la courte le roi et de conseil as tous jours. Et sur ceo soit en present parlement fait estatut s'il plect au*

roi, et de touz autres en temps a venir en cas semblables, pur profit du roi et de roialme.

Responno.—Le roi ent fra sa volente, come mieitz lui semblera. Rot. Parl. 50 Ed. 3, no. 188.

(*o*) In the year 1725, Lord Macclesfield was found guilty without a dissenting voice in the house of lords; but when the question was afterwards proposed in the house of commons, that this house will demand judgment of the lords against Thomas, earl of Macclesfield, it occasioned a warm debate, though (the previous question being first moved) it was carried in the affirmative. Com. Journ. 27th May, 1725; 16 St. Tr. 767. In Lord Strafford's trial, the commons sent the following message to the lords: "That this house holds it necessary and fit, that all the members of the house may be present at the trial: to the end that every one may satisfy his own conscience in the giving of their vote to demand judgment." Com. Journ. 11th of March, 1640.

exerted, through the home secretary, in the pardon of felons, or misdemeanants.

[*487] *An effective pardon from the crown must formerly have been under the great seal (*p*), but now a warrant under the royal sign manual, countersigned by one of the principal secretaries of state, granting a free pardon, or a conditional pardon with the performance of such condition, is equally effectual (*g*).

(3.) A pardon by act of parliament is thus far more beneficial than a pardon by the queen, that a man is not bound to plead it, but the court must *ex officio* take notice of it (*r*): neither can he lose the benefit of it by his own laches or negligence, as he may of the queen's pardon (*s*). The queen's pardon must be specially pleaded, and that at a proper time: for if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon (*t*). But, if a man avails himself thereof as soon as by course of law he may, a pardon may either be pleaded upon arraignment, or in arrest of judgment, or in bar of execution.

(4.) Lastly, the effect of a pardon by the crown, is to make the offender a new man, and to acquit him of all penalties and forfeitures annexed to the offence for which he obtains pardon. But nothing can restore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, except the high and transcendent power of parliament. (760)

(*p*) A warrant under the privy seal, or sign manual, was not of itself a complete irrevocable pardon. *Trial of the Earl of Warwick*, 13 St. Tr. 1015.

(*g*) *Stats.* 6 Geo. 4, c. 25, s. 1; 7 & 8 Geo. 4, c. 28, s. 13; 9 Geo. 4, c. 32, s. 3.

(*r*) *Fost.* 43.

(*s*) 2 Hawk. P. C. 397.

(*t*) *Ib.* 396.

(760) A pardon has been defined as "an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." MARSHALL, C. J., in *United States v. Wilson*, 7 Pet. 150, 160. The Constitution of the United States vests the president with the "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." U. S. Const., art. 2, § 2. The constitutions of the several States have also made provision for granting pardons; and the power in most cases is reposed in the governor, who exercises it with the advice of his council, or other officers designated for the purpose, or alone, as may be provided. The Constitution and statutes of the particular State should be consulted on the subject, and see, generally, *State v. Brewer*, 7 Blackf. (Ind.) 45; *Ex parte Hickey*, 4 Sm. & M. (Miss.) 751; *State v. Fleming*, 7 Humph. (Tenn.) 152; *Ex parte Hunt*, 5 Eng. (Ark.) 284; *Stoop v. Com.*, 8 Barr. (Penn.) 126; *Charleston v. Corleis*, 2 Bailey (S. C.), 186; *ante*, vol. 1, 115, note 61.

After the commission of an offense a pardon may be interposed at common law at any time before prosecution, during trial, and after conviction; but the constitutions of most of the States prohibit pardons prior to conviction. *Ex parte Birch*, 3 Gil. (Va.) 134, 145; *Com. v. Bush*, 2 Duvall (Ky.) 264; *Garland, ex parte*, 4 Wall. (U. S.) 383; *Woollery v. State*, 29 Mo. 300; *Duncan v. Com.*, 4 S. & R. 449; *Com. v. Mash*, 7 Metc. (Mass.) 472.

A pardon fraudulently procured is void. *State v. McIntire*, 1 Jones (N. C.), 1; *Com. v. Halloway*, 44 Penn. St. 210. And to give it validity the pardon must be delivered and accepted. *U. S. v. Wilson*, 7 Pet. 150; *In re Callicot*, 8 Blatchf. 89, 96. See *Com. v. Halloway*, 44 Penn. St. 210; *Ex parte De Puy*, 10 Int. Rev. Rec. 34. But this rule does not apply to a legislative act of amnesty and pardon. See *State v. Blalock*, Phillips (N. C.), 242.

A pardon by the president of the United States does not remove penalties imposed by a State court. *Ridley v. Sherbrook*, 3 Coldw. (Tenn.) 569.

II. Consequences
of judgment.

II. We have next to consider certain proceedings which may be consequent on judgment.

The consequences of attainder (*u*) for high treason or murder are: 1. Forfeiture; and 2. Corruption of blood.

* 1. By attainder for treason, a man forfeits absolutely to the crown [* 488] all his lands and tenements of inheritance, whether in fee simple or

1. Forfeiture. fee tail, and all rights of entry thereon, which he had at, or after, the time of committing the offence, and also the profits of lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist (*x*). This forfeiture relates backwards to the time of the treason committed; so as to avoid all intermediate sales and incumbrances (*y*). But, though after attainder the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits; and therefore, if a traitor dies before judgment pronounced, or is killed in open rebellion, this works no forfeiture of his lands: for he never was attainted of treason (*z*).

All personal property of the traitor vests on his attainder in the crown (*a*).

Arguments justifying the forfeiture or confiscation of property for high treason have been founded on these considerations that he who has thus violated the fundamental principles of government, has abandoned his connection with society; and has no longer any right to those advantages, which before belonged to him purely as a member of the community; among which social advantages, the right of transferring or transmitting property to others is one * of the chief; also that the apprehension of such forfeiture, [* 489] whereby his posterity must suffer as well as himself, will help to restrain a man from committing crime; and will interest every dependent and relative he has to keep him from offending: according to the sentiment of Cicero (*b*), "*nec vero me fugit quam sit acerbum, parentum scelera filiorum pœnis lui: sed hoc præclare legibus comparatum est, ut caritas liberorum amiciores parentes reipublicæ redderet.*" Indeed the only plausible ground of upholding forfeiture for crime seems to be that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into a social community. If therefore a member of the state violates the so called fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he might claim under that contract; and the state may justly resume such property, or any part of it, as the law had before assigned to him. Nevertheless all post-

(*u*) A person capitally sentenced for treason is said to be attaint, *attinctus*, stained, or blackened, and by an anticipation of his punishment, is already dead in law (8 Inst. 218). This is after judgment: for, after conviction only, a man is liable to no such disability as mentioned in the text; since there is still, in contemplation of law, a possibility of his innocence.

As to the law of attainder, see *Kynnaire v. Leake*, L. R. 1 C. P. 397.

(*x*) Co. Litt. 392 b; 8 Inst. 19.

Copyhold estates are forfeited to the lord, not to the crown, unless there be an act of

parliament or an express custom to the contrary, Scriven, Cop. 5th ed. 313.

As to forfeiture of trust estates, *ante*, vol. ii.

(*y*) 8 Inst. 211.

(*z*) Co. Litt. 18.

(*a*) Resolution in *Twyne's Case*, 3 Rep. 82 b, and cases cited, *post*.

(*b*) Ad Brutum, epist. 12.

Aulus Cassellius, a Roman lawyer in the time of the triumvirate, used to boast that he had two reasons for despising the power of the tyrants; his old age and his want of children: for children are pledged to the prince of the father's obedience. Gravin. 1, s. 68.

humous punishment savours of hardship to the innocent; and must especially do so when applied to crimes which do not strike at the very root and foundation of society, as treason against the government expressly does (c).

[* 490] With us in England, forfeiture of lands and tenements * to the crown for treason is by no means derived from the feudal policy, but was transmitted to us from our Saxon ancestors (d), and formed a part of the ancient Scandinavian constitution (e). The infliction of such a penalty is essentially opposed to the more just and merciful views now prevalent, and an effort which nearly proved successful was long since made to mitigate the severity of this law, and to abolish entirely the hereditary punishment entailed by it, for it was enacted by statute 7 Ann. c. 21, s. 10, that, after the decease of the pretender, and the efflux of three years from the demise of the then sovereign, no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person other than the traitor himself during his lifetime. By which, the law of forfeitures for high treason would by this time have been at an end, had not a subsequent statute intervened to give them a longer duration. The history of this matter is somewhat singular, and worthy of observation. At the time of the union with Scotland, the crime of treason was, by the Scotch law, in many respects different from that in England; and particularly in its consequence of working the forfeiture of entailed estates, which was more peculiarly English; yet it seemed necessary, that a crime so nearly affecting government should, both in its essence and consequences, be put upon the same footing in both parts of the united kingdom. In new-modelling these laws, the Scotch nation and the English house of commons struggled hard, respectively to maintain and to acquire a total immunity from forfeiture and corruption of blood; which the house of lords as firmly resisted. At length a compromise was agreed to, and established by the above-mentioned statute (f), viz. that the same crimes, and no other, should be treasons in

[* 491] Scotland that are so in * England; and that the English forfeitures and corruption of blood should take place in Scotland till the death of the pretender, and the expiration of three years after the next succession to the crown; and then cease throughout the whole of Great Britain (g): the lords artfully proposing this temporary clause, in hopes (it is said (h)) that the prudence of succeeding parliaments would make it perpetual (i), and this was partly done by the statute 17 Geo. 2, c. 39, s. 8, which further suspended the operation of the clauses specified till the death of the sons of the pretender. However, by the 39 Geo. 3, c. 93, the above mentioned clauses in the 7 Ann. c. 21, and the 17 Geo. 2, c. 39, limiting the periods when forfeiture for treason should be abolished, were repealed, and the law of forfeiture, in the case of high treason, is now the same as it was by the common law, or as it stood prior to the seventh year of the reign of Queen Anne. It is nevertheless proper

(c) Therefore, though confiscations were frequent in the times of the earlier emperors, yet Arcadius and Honorius in every instance except that of treason thought it just, "*ibi esse panam, ubi et noxa est*;" and ordered that "*peccatu suos teneant auctores, nec ulterius progrediatur metus, quàm reperitur delictum*" (Cod. 9, 47, 22); and Justinian also made a law to restrain the punishment of relatives (Nov. 134, c. 13); which directs the forfeiture to go, except in the case of *crimen*

majestatis, to the next of kin of the delinquent.

(d) Anc. Laws & Inst. Eng. pp. 28, 29, 175.

(e) Stiermh. de Jure Goth. l. 2, c. 6, & l. 3, c. 3.

(f) Sects. 7, 10.

(g) Burnet's Hist. A. D. 1709.

(h) Considerations on the Law of Forfeiture, p. 6.

(i) See Fost. 250.

to apprise the reader that the rigour of the law of forfeiture generally is in practice much tempered in virtue of certain modern enactments, for lands to which the crown becomes entitled "by reason of any forfeiture," may under the provisions of stat. 59 Geo. 3, c. 94 (*k*), be granted either unconditionally or in consideration of money to such person as the crown may be pleased to direct, and the powers thus conferred were extended to leasehold property by the stat. 6 Geo. 4, c. 17.

When sentence of death has, in due course, been pronounced upon a person convicted of murder (which, as also treason, is excluded from the operation of the statute 54 Geo. 3, c. 145), the crown becomes entitled by forfeiture to the profits of all his estates of freehold during life, such estates escheating at his death by reason of the *corruption of blood caused by the attainer, and on sentence passed for felony generally the offender forfeits his [* 492] chattel interests absolutely, and the profits of estates of freehold during life. On attainer for murder, moreover, the felon's lands in fee simple (but not those in tail) pass to the crown, for a short period of time: for the king shall have them for a year and a day, and may commit therein what waste he pleases; which is called the king's year, day, and waste (*l*), and at the present day is usually compounded for. Formerly the king had only a liberty of committing waste on the lands of felons, by pulling down their houses, extirpating their gardens, ploughing their meadows, and cutting down their woods. But this tending greatly to the prejudice of the public, it was agreed, in the reign of Henry I., that the king should have the profits of the felon's land for one year and a day, in lieu of the destruction he was otherwise at liberty to commit (*m*): and therefore *Magna Carta* (*n*) provides, that the king shall only hold such lands for a year and a day, and then restore them to the lord of the fee; without any mention made of waste. But the statute 17 Edw. 2 *de prerogativa regis*, seems to suppose, that the king shall have his year, day, and waste; and not the year and day instead of waste. Which sir Edward Coke (and the author of the Mirror before him) very justly look upon as an encroachment, though a very ancient one, of the royal prerogative (*o*). This year, day, and waste, if not compounded for, regularly belong to the crown: and, after their expiration, the land would naturally have descended to the heir (as in gavelkind tenure it still does), did not its feudal quality intercept such descent, and give it by way of escheat to the lord (*p*). These forfeitures for felony arise upon attainer; and therefore a *felo de se* forfeits no lands of inheritance or freehold, for he never was *attainted as a felon (*q*). They, as well as forfeitures for treason, relate back to the time of the [* 493] offence committed; so as to avoid all intermediate charges and conveyances.

No mention is here made of the particular forfeitures created by the statutes of *præmunire*, because they may be looked upon rather as a part of the judgment and penalty inflicted thereunder, than as consequences of such judgment. But I may just mention that the profits of lands are forfeited during life in two other instances, besides those already spoken of: viz. misprision of

(*k*) Sect. 1. The statute cited *supra* amends and extends the scope of some prior acts, conferring like powers on the crown.

(*l*) 2 Inst. 37.

(*m*) Mirr. c. 4, s. 16; Flet. l. 1, c. 28.

(*n*) 9 Hen. 3, c. 22.

(*o*) Mirr. c. 5, s. 1; 2 Inst. 37.

(*p*) *Ante*, vol. ii. chap. 15.

(*q*) 3 Inst. 141.

treason (*r*), and striking in Westminster-hall, or drawing a weapon upon a judge there sitting (*s*).

The forfeiture of goods and chattels (*t*) accrues in high treason or misprision thereof, also (with certain statutory exceptions (*u*)) in felony and self murder, and the above mentioned offences of striking, &c. in Westminster-hall (*x*). Formerly also on an accusation of treason, or felony, whether the party were found guilty or acquitted, if the jury found that he had fled, the accused forfeited his goods and chattels: for the very flight was regarded as an offence, carrying with it a strong presumption of guilt, and, as an endeavour to elude and stifle the course of justice prescribed by the law. But the jury very seldom found the flight (*y*): forfeiture being looked upon as too severe a penalty for an offence, to which a man was prompted by his natural love of liberty. And now by the stat. 7 & 8 Geo. 4, c. 28, s. 4, where a person is indicted for treason or felony, the jury impanelled to try the accused shall [* 494] not be charged to *inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony.

A remarkable difference or two must here be noticed between the forfeiture of lands and that of goods and chattels. (1.) Lands are forfeited upon attainder: goods and chattels are forfeited by conviction (*z*); indeed in many cases where goods are forfeited, there is no attainder; which happens only where judgment of death or outlawry is given; therefore in those cases the forfeiture must be upon conviction, or not at all; and, being necessarily upon conviction in those, it is so ordered in all other cases, for the law loves uniformity. (2.) In outlawry for treason or felony, lands are forfeited only by the judgment: but the goods and chattels are forfeited by a man's being first put in the exigent, without staying till he is finally outlawed.

(3.) The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and incumbrances; but the forfeiture of goods and chattels has no relation backwards; so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may *bonâ fide* (*a*) sell any of his chattels, real or personal, for the sustenance of himself and family between the fact and conviction (*b*): for personal property is of so fluctuating a nature, and passes through so many hands in a short time, that no buyer could be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony. Yet if the goods were collusively, and not *bonâ fide*, parted [* 495] with merely to defraud the crown, the law would *reach them; as being truly and substantially the goods of the offender; and recover them for the crown.

2. The other remarkable consequence of attainder for high treason or mur-

(*r*) *Ib.* 218.

(*s*) 8 Inst. 141.

(*t*) Goods confiscated were termed *bona confiscata*, by the civilians, because they belonged to the *fiscus* or imperial treasury; goods forfeited, or *bona fisci facta*, are such whereof the property is gone away, or departed from the owner.

(*u*) As to forfeiture in larceny, see stats. 10 & 11 Vict. c. 82; 18 & 14 Vict. c. 37; 18 & 19 Vict. c. 126; *ante*, p. 296.

(*x*) See *Bullock v. Dodds*, 2 B. & Ald. 258; 1 Russ. & M. 752.

(*y*) Staundf. P. C. 183 b.

(*z*) By conviction of a felon, his goods and chattels are forfeited, but by attainder, that is by judgment given, his lands and tenements are forfeited and his blood corrupted, and not before. Co. Litt. 391 a.

(*a*) See *Perkins v. Bradley*, 1 Hare, 219; *Chowns v. Baylis*, 31 Beav. 351.

(*b*) 2 Hawk. P. C. 454; *Fleetwood's Case*, 8 Rep. 171; see *Whitaker v. Wisbey*, 12 C. B. 44.

2. Corruption of blood. der is corruption of blood, to which we have sufficiently adverted in our second Volume (c).

The various punishments annexed to offences having from time to time been specified in the preceding pages, and some remarks having likewise been made as to the sentence to be passed by the presiding judge upon the convicted person (d), we need here only repeat that where such sentence adjudges capital punishment (e), the sheriff cannot alter the manner of its execution by substituting one kind of death for another, without being guilty of felony himself (f). It is held, indeed, by sir Edward Coke (g) and sir Matthew Hale (h), that even the crown cannot change the punishment of the law, as by altering hanging into beheading; though, when beheading is part of the sentence, the crown may remit the rest (i). And, notwithstanding some examples to the contrary, sir Edward Coke stoutly maintains, that "*judicandum est legibus, non exemplis*." Others, however, have thought (j), and most justly, that this prerogative, being founded in mercy, and immemorially exercised by the crown, is part of the common law. For, hitherto, in every instance, such exchange has been for a more merciful kind of death; and how far this may also fall within the power of the crown to grant a conditional pardon, (viz. by remitting a severe kind of death, on condition that the criminal submits to a milder), is a matter that may bear consideration. It is observable, that when lord Stafford * was executed for the popish plot [* 496] in the reign of king Charles II., the then sheriffs of London, having received the king's writ for beheading him, petitioned the house of lords for a command or order from their lordships, how the said judgment should be executed; for, he being prosecuted by impeachment, they entertained a notion (which is said to have been countenanced by lord Russell) that the king could not pardon any part of the sentence (k). The lords resolved (l) that the scruples of the sheriffs were unnecessary, and declared that the king's writ ought to be obeyed. Disappointed of raising a flame in that assembly, they immediately signified (m) to the house of commons by one of its members, that they were not satisfied as to the power of the said writ. That house took two days to consider of it; and then (n) sullenly resolved that the house was content that the sheriff do execute lord Stafford, by severing his head from his body. It is further related, that when afterwards the same lord Russell was condemned for high treason upon indictment, the king, while he remitted the ignominious part of the sentence, observed, "that his lordship would now find he was possessed of that prerogative, which in the case of lord Stafford he had denied him" (o). One can hardly determine (distant as we are from those turbulent times) which most to disapprove of, the indecent and sanguinary zeal of the subject, or the cool and cruel sarcasm of the sovereign.

In concluding this chapter it may be well to take note of a recent most

(c) Chap. 15.

(d) *Ante*, pp. 470, *et seq.*

(e) To kill an attainted felon without warrant of law would be murder. *Macdonald's Case*, 18 St. Tr. 802.

(f) *Ante*, p. 212.

(g) 3 Inst. 52.

(h) 2 Hale, P. C. 412.

(i) As to the statute law, see *ante*, p. 97.

(j) Fost. 270; F. N. B. 244 h; 19 Rym. Fed. 284.

(k) Hume, Hist. Eng. viii. p. 143.

(l) Lords Journ. 21 Dec. 1680.

(m) Com. Journ. 21 Dec. 1680.

(n) *Ib.* 28 Dec. 1680.

(o) Hume, Hist. Eng. viii. p. 193.

salutary statute (*p*), which enacts *inter alia* as follows: that judgment of death shall henceforth be executed on any prisoner sentenced on an indictment or inquisition for murder within the walls of the prison in which the offender is confined, in the presence of the sheriff or his deputy and certain other persons; that after execution the fact of death is to be certified by * the prison [*497] surgeon, and that a coroner's inquest is to be held upon the body, though the omission to comply with any such requirement of the act will not make the execution illegal in any case where it would otherwise have been legal. (761)

We have now reached the end of criminal procedure, and in the remaining pages of our Volume propose to take a retrospective survey of some conspicuous features in the history of English law.

[*498]

* CHAPTER XXI.

THE RISE AND PROGRESS OF THE LAWS OF ENGLAND.

In this chapter (*a*) is attempted a brief historical review of the most remarkable changes and alterations that have happened in the law of England; first, however, the student must be reminded that the rise and progress of many of its doctrines have been already pointed out in the course of these Commentaries, under their respective divisions: these having been already particularly discussed will not here be re-examined with any degree of minuteness. What I at present purpose is rather to mark out some outlines of an English juridical history, by taking a chronological view of the state of our laws, and their successive mutations at different periods of time.

The several periods, under which the state of our legal polity will be considered, are the following: I. From the earliest times to the Norman conquest: II. From the Norman conquest to the reign of king Edward I.: III. From thence to the reformation: IV. From the reformation to the restoration of

(*p*) 81 & 82 Vict. c. 24.

(*a*) As authenticating generally what is stated in the above chapter, the following works may be consulted:—Ancient Laws and

Inst. Eng. A.D. 1840; Hale, Hist. C. L.; Hallam, Const. Hist. Eng.; Irving, Introd. Civ. Law, 4th Ed.; Forsyth, Hist. Trial by Jury; Serj. Sellon's Pract.

(761) In the United States the punishment of criminal offenses is fully regulated by statute. Felony, under the statutes, is usually punished by imprisonment in the State prison. If no punishment is specially directed by the statute the penalty is death. *State v. Scott*, 1 Hawks (N. C.), 24. In case of misdemeanor, if the law provides no other penalty, the punishment is fine and imprisonment, or either, at the discretion of the court. *State v. Roberts*, 1 Hayw. (N. C.) 176.

The Constitution of the United States provides that "cruel and unusual punishment" shall not be inflicted (U. S. Const. Amend., art. 8); and some of the State Constitutions contain a similar provision. See *State v. Adams*, 1 Brev. (S. C.) 279; *Turnipsseed v. State*, 6 Ala. 664; *Barker v. People*, 8 Cow. 688; *James v. Com.*, 12 Serg. & R. (Penn.) 220; *Com. v. Wyatt*, 6 Rand. (Va.) 694; *U. S. v. Collins*, 2 Curtis' C. C. 194.

king Charles II.: V. From thence to the revolution in 1688: VI. From the revolution to the passing of the Reform Act, A.D. 1832: and VII. From the passing of the Reform Act to the present time.

* I. And, first, with regard to the ancient Britons, the aborigines of our island, we have so little handed down to us concerning them [* 499] with any tolerable certainty, that our inquiries here must needs be very fruitless and defective. However, from Cæsar's account of the tenets and discipline of the Druids in Gaul, in whom centered all the learning of these western parts, and who were, as he tells us, sent over to Britain (that is, to the island of Mona or Anglesey), to be instructed; we may collect some few affinities and resemblances to our English law. The very notion indeed of an oral unwritten law, delivered down from age to age, by custom and tradition merely, may have been derived from the practice of the Druids, who seem never to have committed any of their instructions to writing, possibly for want of letters; since it is remarkable that in none of the antiquities, unquestionably British, which the industry of modern archæologists has discovered, is the least trace of any character or letter to be found. The partible quality also of lands by the custom of gravelkind, which still obtains in some parts of England, and did universally over Wales till the reign of Henry VIII., is probably of British origin.

The various nations which successively broke in upon and destroyed the British inhabitants and constitution, the Romans, the Picts, and, after them, the various clans of Saxons and Danes, must necessarily have caused confusion and uncertainty in the laws and antiquities of the kingdom; forasmuch as they became gradually incorporated and blended together, and therefore, we may suppose, communicated to each other their respective usages, regarding the rights of property and the punishment of crimes. It is therefore morally impossible to trace out, with any degree of accuracy, when the several mutations of the common law were made, or whence respectively originated those several customs which we at present use, by any chemical resolution of them into their first and * component principles. We can seldom pronounce, that this custom was derived from the Britons; that was left behind by [* 500] the Romans; this was a necessary precaution against the Picts; that was introduced by the Saxons, discontinued by the Danes, but afterwards restored by the Normans.

Wherever this can be done, it is matter of great curiosity, and some use: but it can rarely be done, partly for the reason above-mentioned, and also for the following reasons. First, from the nature of traditional laws in general; which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice: so that, though upon comparison we may plainly discern the alteration of a law from what it was five hundred years ago, yet it may be impossible to define the precise period in which that alteration occurred, any more than we can discern the changes of the bed of a river, which varies its shores by continual decreases and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and its government: which alone, though it had been disturbed by no foreign invasions, would make it impossible successfully to search out and to fix with certainty the origin of its laws. Thirdly, this uncertainty as to the true source of particu-

lar customs must also in part have arisen from the means whereby Christianity was propagated among our Saxon ancestors in this island; by learned foreigners brought over from Rome and other countries, who doubtless carried with them many of their own national customs; and probably prevailed upon the state to abrogate such usages as were inconsistent with our religion, and to introduce others that were more conformable thereto. And this perhaps may have partly been the cause, that we find at an early period rules not only of the mosaical, but also of the imperial and pontifical laws, blended with and adopted into our own system.

[* 501] A further reason may also be given for the great * variety, and of course the uncertain origin, of our ancient established customs: even after the Saxon government was firmly established in this island: viz. the subdivision of the country into a heptarchy, consisting of seven independent kingdoms, peopled and governed by different clans and colonies. This must have tended to create an infinite diversity of laws: even though all those colonies, of Jutes, Angles, Anglo-Saxons, and the like, originally sprung from the same mother-country, the great northern hive; which poured forth its warlike progeny, and swarmed all over Europe, in the sixth and seventh centuries. A multiplicity of laws must necessarily be where a kingdom is cantoned out into provincial establishments; not under one common dispensation of laws, though under the same sovereign power. Much more must it have existed where each of seven unconnected states had independently to form its own constitution and superstructure of government, though all these states began to build upon the same or similar foundations.

When therefore the West Saxons had swallowed up all the rest, and the monarchy of England, whereof Egbert was the founder, came into existence, a great and necessary work was begun and gradually carried out, being no less than the modelling of a constitution, the building of it on a plan that should endure for ages, and the forming out of many old discordant materials, which were heaped upon each other in a vast and rude irregularity, of one uniform and well connected whole. This was effected, by reducing the kingdom under one regular subordination of government, wherein each man was answerable to his immediate superior for his own conduct and that of his nearest neighbours: by the subdivision of England into tithings and hundreds, if not into counties; all under the influence and administration of one supreme magistrate; in whom, as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct, yet

[* 502] * communicating, ducts and channels: by collecting the various customs dispersed throughout the kingdom, and reducing and digesting them into one uniform system: and by establishing tribunals for the trial of causes civil and criminal, in the very districts wherein complaints arose; all of them subject however to be inspected, controlled, and kept within the bounds of the universal or common law, by the king's own courts; which were then itinerant, being held in the king's palace, and removing with his household in those royal progresses, which he continually made from one end of the kingdom to the other.

The Danish invasion and conquest, which introduced new foreign customs, dealt a severe blow to this noble fabric; but a plan so excellently concerted could not be altogether thrown aside. So that, upon the expulsion of these

intruders, the English returned for the most part to their ancient law; retaining, however, some few of the customs of their late visitants; which went under the name of *Dane-Lage*; as the code compiled during the heptarchy was called the *West-Saxon-Lage*; and the local constitutions of the ancient kingdom of Mercia, which obtained in the counties nearest to Wales, and probably included very many British customs, were called the *Mercen-Lage*. And these three collections of laws were, about the beginning of the eleventh century, in use in different counties of the realm: the provincial polity of counties, and their subdivisions not having been materially altered or discontinued through the shocks and mutations of government, though the laws and customs therein used, have (as we shall see) often suffered considerable changes.

For King Edgar observing the ill effects of three distinct bodies of laws prevailing at once in separate parts of his dominions, projected and begun what his grandson king Edward the Confessor afterwards completed; viz. one uniform digest of laws to be observed throughout the whole kingdom; being perhaps no more than a revival * of some pre-existing code, with improvements suggested by necessity and experience; particularly the [* 503] incorporating some of the British or rather Mercian customs, and also such of the Danish as were reasonable and approved, into the *West-Saxon-Lage*, which was still the groundwork of the whole. And this appears to be the best supported and most plausible conjecture (for certainty is not to be expected) respecting the rise and origin of some considerable portion of that admirable system of maxims and unwritten customs which is now known to us as the common law.

Among the most remarkable features of the Saxon system of government and laws we may reckon, 1. The holding of general assemblies of the principal and wisest men in the nation: the *wittena-gemote*, or *commune consilium* of the ancient Germans; without whose concurrence no new law could be made, or old one altered. 2. The election of their magistrates by the people; originally even that of their kings, till dear-bought experience evinced the convenience and necessity of establishing a hereditary succession to the crown. But the right of electing subordinate magistrates, their military officers or heretochs, their sheriffs, their conservators of the peace, their coroners, their portreeves (since changed into mayors and bailiffs), and even their tythingmen and borseholders at the leet, was vested in the people, some till the Norman conquest, others for two centuries after it, whilst some remain so to this day. 3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles upon which it has ever since continued: only that, perhaps, in case of minority, the next of kin of full age would ascend the throne, as king, and not as protector; though, after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for a first offence; even the most notorious offender being allowed to commute his punishment for a fine or *weregild*, or, in default of payment, perpetual * bondage; to which the benefit of clergy afterwards [* 504] in some measure succeeded. 5. The prevalence of certain customs and military services which much resembled those under the feudal constitution, but yet were exempt from its rigorous hardships; and which may have been imported by the Saxons. 6. That estates were liable to forfeiture for

treason, but that the doctrine of escheats and corruption of blood for felony, or any other cause, was unknown. 7. The descent of land to all the males equally, without any right of primogeniture; a custom, which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman conquest; though in some respects inconvenient, especially destructive to ancient families, and prejudicial to the maintenance of an intermediate state between the prince and the common people. 8. The courts of justice consisted principally of the county courts, and in cases of weight or nicety the king's court before himself in person, during the session of his parliament, which was usually held in different places, according as he kept the three great festivals of Christmas, Easter, and Whitsuntide. In these county courts the ecclesiastical and civil jurisdictions were blended together, the bishop and the ealdorman or sheriff sitting in the same county court; and the decisions and proceedings therein were simple and unembarrassed; an advantage which will always attend the infancy of laws, but wears off as they gradually advance to maturity. 9. Trials, among a people who had a very strong tincture of superstition, were permitted to be ordeal, by the corsned, or morsel of execration, or by wager of law with compurgators, if the party chose it; but frequently a disputed question was settled in another tribunal composed of persons clothed with judicial authority over whom the shirereeve presided, though without taking part in their decision, and by whom the evidence of the litigants and the testimony of the neighbourhood were entertained.

[* 505] Thus stood the general frame of our polity * at the time of the Norman invasion; when the second period of our legal history commences.

II. This remarkable event wrought as great an alteration in our laws, as it did in our ancient line of kings; and though the alteration of the former was effected rather by the consent of the people than by any right of conquest, yet that consent seems to have been partly extorted by fear, and partly given without apprehension of the consequences which afterwards ensued.

1. Among the first of these alterations we may reckon the separation of the ecclesiastical from the civil courts; effected in order to ingratiate the new king with the popish clergy, who for some time before had been endeavouring all over Europe to exempt themselves from the secular power; and whose demands the conqueror, like a politic prince, thought it prudent to comply with, by reason that their reputed sanctity had a great influence over the minds of the people; and because all the little learning of the times was engrossed into their hands, which made them necessary men, and by all means to be gained over to his interests. And this was the more easily effected, because, the disposal of all the episcopal sees being then in the breast of the king, he had taken care to fill them with Italian and Norman prelates.

2. Another violent alteration of the English constitution consisted in the depopulation of large districts, for the purposes of the king's diversion; and subjecting both them, and the ancient forests of the kingdom, to the unreasonable severities of forest laws, imported from the continent, whereby the slaughter of a beast was made almost as penal as the death of a man. In the Saxon times; though no person was allowed to kill or chase the king's deer, yet he might start any game, pursue, and kill it, upon his own estate. But the rigour of these new constitutions vested the sole property of all the game

in England in the crown, and no man was entitled to * disturb any [* 506] fowl of the air, or any beast of the field, of such kinds as were specially reserved for the amusement of the sovereign, without express licence from him, by the grant of a chase or free-warren: and those franchises were granted as much with a view to preserve the breed of animals as to indulge the subject. By degrees the forest laws became mitigated, and at length grew entirely obsolete, yet from this root sprung bastard slips, still known to us as the game laws.

3. A third alteration effected in the English laws was by narrowing the remedial influence of the county courts, the great seats of Saxon justice, and extending the original jurisdiction of the king's justiciars to all kinds of causes, arising in all parts of the kingdom. To this end the *aula regis*, with its multifarious authority, was erected; and a capital justiciary was appointed, with powers so large and boundless, that he became at length a tyrant to the people, and formidable to the crown itself. The constitution of this court, and the judges themselves who presided there, were fetched from the duchy of Normandy: and the consequence naturally was, the ordaining that all proceedings in the king's courts should be carried on in the Norman, instead of the English language. A provision the more necessary, because none of his Norman justiciars understood English; but as evident a badge of slavery as ever was imposed upon a conquered people. This lasted till king Edward III. obtained a double victory, over the armies of France in their own country, and their language in our courts at home (b). But there * was one mischief [* 507] too deeply rooted thereby, and which this caution of king Edward came too late to eradicate. Instead of the plain and easy method of determining suits in the county courts, the chicanes and subtilties of Norman jurisprudence had taken possession of the king's courts, to which every cause of consequence was drawn. That age, indeed, was an era of refinement and subtilty. There is an active principle in the human soul, which will ever be exerting its faculties to the utmost stretch, in whatever employment, by the accidents of time and place, the general plan of education, or the customs and manners of the age and country, it may happen to find itself engaged. As regarded literature, the northern conquerors of Europe were then emerging from the grossest ignorance; and those who had leisure to cultivate its progress, were such only as were cloistered in monasteries, the rest being either soldiers

(b) By stat. 36 Edw. 3, c. 15, it was enacted that, for the future, all pleas should be pleaded, shown, defended, answered, debated, and judged in the English tongue; but be entered and enrolled in Latin. After this statute, however, the reports were still printed in law French. Law Latin, which succeeded the French, for the entry and enrolment of pleas continued in use for four centuries, viz., from the time of its first introduction, till the subversion of our ancient constitution under Cromwell; when, among many other innovations in the law, some for the better and some for the worse, the language of our records was altered and turned into English. But, at the restoration, this novelty was no longer countenanced; the practitioners finding it difficult to express themselves so concisely or significantly in

any other language as in Latin. And this state of things continued till the year 1731: when it was again thought proper that the proceedings at law should be in English, and it was accordingly so ordered by statute 4 Geo. 2, c. 26. This provision was made according to the preamble of the statute, that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and pleadings, the judgment and entries in a cause.

Technical phrases, however, and the names of writs and other process, were found to be so incapable of wearing an English dress with any degree of propriety that in two years time it was found necessary to make a new act, 6 Geo. 2, c. 14, of which sect. 5 allowed all technical words to continue in the usual language.

or peasants. And, unfortunately, the first rudiments of science imbibed were drawn out of Aristotle's philosophy, and conveyed through the medium of his Arabian commentators; whose writings, brought from the east by the Saracens into Palestine and Spain, were translated into barbarous Latin. So that, [* 508] though the objects to which students naturally applied themselves * in the infancy of a rising state, were of the noblest kind; the establishment of religion, and the regulation of civil polity; yet having only such tools to work with, their execution was trifling and flimsy. Both the divinity and the law of those times were frittered into logical distinctions, and drawn out into metaphysical subtilties, with a skill most amazingly artificial; yet which serves no other purpose, than to show the vast powers of the human intellect, however vainly or preposterously employed. Hence law in particular, which (being intended for universal reception) ought to be a plain rule of action, became a science of the greatest intricacy; especially when blended with the new refinements engrafted upon feudal property, which refinements were from time to time gradually introduced by the Norman practitioners, with a view to supersede (as they did in great measure) the more homely, but more intelligible, maxims of distributive justice among the Saxons. And, to say the truth, these scholastic reformers transmitted their dialect and finesses to posterity, so interwoven in the body of our legal polity, that they have not yet been wholly shaken off and cast aside.

People even at the present day are apt to be angry at the want of simplicity in our laws, though they often mistake variety for confusion and complicated for contradictory decisions. In a nation of freemen, a polite and commercial people, the same paucity of laws, the same conciseness of practice, cannot, however, reasonably be looked for, as might suffice under other circumstances.

Under an arbitrary despotic government, where lands are at the disposal of the prince, the rules of succession to, or the mode of enjoying them must depend upon his will and pleasure. Hence there can be but few legal determinations relating to the property, the descent, or the conveyance of real estates; and the same holds in a stronger degree with regard to goods and chattels, and the contracts thereto relating. Under a tyrannical sway [* 509] * trade must be continually in jeopardy, and of consequence can never be extensive: this therefore puts an end to the necessity of an infinite number of rules, which the English merchant daily recurs to for adjusting commercial differences. Marriages are then usually contracted with slaves; or at least women are treated as such: no laws can be therefore expected to regulate the rights of dower, jointures, and marriage settlements. Few also are the persons who can claim the privileges of any laws; the bulk of those inhabiting a country arbitrarily governed, viz. the commonalty, boors, or peasants, being merely villeins and bondmen. These are therefore left to the private coercion of their lords, are esteemed incapable either of enjoying rights or of sustaining injuries, and of consequence are entitled to no redress. Thus we may see under an arbitrary government, how large a field of legal contests is rooted up and destroyed.

Again: were we a poor and naked people, as the savages of Western America, strangers to science, commerce, and the arts as well of convenience as of luxury, we perhaps should be content to refer all disputes to the next man we might meet upon the road, and so put a short end to every controversy. For in a

state of nature there is no room for municipal laws; and the nearer any nation approaches to that state, the fewer they will have occasion for. When the people of Rome were little better than sturdy shepherds or herdsmen, all their laws are said to have been contained in ten or twelve tables; but as luxury, politeness, and dominion increased, the civil law increased in the same proportion; and, though successively pruned, retrenched, and digested by the Emperors Theodosius and Justinian, swelled to an enormous bulk.

So we may observe, that, in petty states and narrow territories, fewer laws will suffice than in large ones, because there are fewer objects upon which the laws can operate. The regulations of a private family are few, simple, * and well-known; those of a prince's household are necessarily more various and diffuse. [* 510]

The main causes therefore of the multiplicity of the English laws are, the extent of the country which they govern; the commerce and refinement of its inhabitants; but above all, the liberty and rights of property of the subject. These will naturally produce an infinite fund of disputes, which must be judicially terminated, and it is essential to a free people, that these judicial determinations be published and adhered to; in order that their property may be as certain and fixed as the very constitution of their state. With us the judge is only to declare and pronounce, not to make or new-model, the law. Hence a multitude of decisions, or cases adjudged, will arise; for seldom will it happen that any one rule or precedent will exactly suit for many cases. And in proportion as the decisions of courts of judicature are multiplied, the law will be loaded with decrees, that may sometimes (though rarely) interfere with each other: either because succeeding judges may not be apprised of the prior adjudication; or because they may think differently from their predecessors; or because the same arguments did not occur formerly as at present; or, in fine, because of the natural imbecility and imperfection that attends all human proceedings. But wherever this happens to be the case in any material point, the legislature may intervene to remove the doubt, and, upon due deliberation had, to determine by a declaratory statute how the law shall be held for the future.

But is not (it will be asked) the multitude of law-suits an argument against the clearness and certainty of the law itself? Not altogether so, for among the various disputes and controversies which are daily to be met with, it is observable that comparatively few arise from obscurity in the rules or maxims of our law. But the dubious points, usually agitated in our courts, arise chiefly from the difficulty there is in ascertaining the * intentions of individuals, in their solemn dispositions of property; in their con- [* 511] tracts, conveyances, and testaments. It is an object indeed of the utmost importance in this free and commercial country, to lay as few restraints as possible upon the transfer of possessions from hand to hand, or upon the designations marked out for them by the prudence, convenience, necessities, or even by the caprice, of their owners: yet to determine the intention of the owner is frequently a matter of difficulty, and although our law rarely hesitates in declaring its own meaning, the judges are frequently puzzled to find out the meaning of others, who clothe their intentions in dark or new-fangled expressions.

But, notwithstanding the vast accession of legal controversies, arising from

so fertile a fund as the ignorance and wilfulness of individuals, these will bear no comparison in point of number with those which are caused by the dishonesty, and disingenuousness of parties: by either their suggesting complaints that are false in fact, and thereupon bringing groundless actions; or by their denying such facts as are true, in setting up unwarrantable defences. And thus much, in passing, as to the alleged uncertainty of our English law.

4. A fourth innovation was the introduction of the trial by combat, for the decision of civil and criminal questions of fact in the last resort. This was the immemorial practice of the northern nations; but first reduced to regular and stated forms among the Burgundi, about the close of the fifth century: and from them it passed to other nations, particularly the Franks and the Normans: which last had the honour to establish it here, though clearly an unchristian, as well as most uncertain, method of trial. But it was a sufficient recommendation of it to the conqueror and his warlike countrymen, that it was the usage of their native duchy of Normandy.

5. But the last and most important alteration, both in our civil and military polity, was the engrafting on all * landed estates, a few only excepted, [* 512] the fiction of feudal tenure; which drew after it a numerous and oppressive train of servile fruits and appendages; aids, reliefs, primer seisins, wardships, marriages, escheats, and fines for alienation; the genuine consequences of the maxim then adopted, that all the lands in England were derived from and holden, mediately or immediately, of the crown.

The nation at this period seems to have groaned under as absolute a slavery, as it was in the power of a warlike, an ambitious, and a politic prince to create. The consciences of men were enslaved by ecclesiastics, devoted to a foreign power, and unconnected with the civil state under which they lived. The laws, as well as the prayers, were administered in an unknown tongue. The ancient trial by the country gave way to the decision by battle. The forest laws unduly restrained rural pleasures and manly recreations. And in cities and towns the case was no better; all company being obliged to disperse, and fire and candle to be extinguished, by eight at night, at the sound of the melancholy curfew. The ultimate property in all lands, and a considerable share of their present profits, were vested in the king, or by him granted out to his Norman favourites; who, by a gradual progression of slavery, were absolute vassals to the crown, and as absolute tyrants to the people. Unheard-of forfeitures, tallages, aids, and fines, were arbitrarily extracted from the pillaged landholders, in pursuance of the new system of tenure. And, to crown all, as a consequence of the tenure by knight-service, the king had always ready at his command an army of sixty thousand knights: who were bound, upon pain of having their estates confiscated, to attend him in time of invasion, or to quell any domestic insurrection. Trade, or foreign merchandize, was carried on by the Jews and Lombards, and the very name of an English fleet was unknown to Europe: the nation consisting wholly of the clergy, who were also the lawyers; the barons, or great lords of the land; the knights, [* 513] * or soldiery, who were the subordinate landholders; and the burghers, or inferior tradesmen, who from their insignificance happily retained, in socage and burgage tenures, some symbols of their ancient freedom. The rest were villeins or bondmen.

From so complete and well-concerted a scheme of servility, it has been the

work of generations for our ancestors, to redeem themselves and their posterity into that state of liberty which we now enjoy: and which therefore is to be looked upon as resulting not from mere encroachments on the crown, and infringements on the prerogative, as some have endeavoured to maintain; but from a gradual restoration of that ancient constitution, whereof our Saxon forefathers had been unjustly deprived, partly by the policy, and partly by the force, of the Norman. How that restoration has, in a long series of years, been step by step effected, I will now inquire.

William Rufus proceeded on his father's plan, and in some points extended it; particularly with regard to the forest laws. But his brother and successor, Henry I. found it expedient, when first he came to the crown, to ingratiate himself with the people; by restoring, as our monkish historians tell us, or at all events partially restoring, the laws of King Edward the Confessor. By charter he gave up the great grievances of marriage, ward, and relief, the beneficial pecuniary fruits of feudal tenures; but reserved the tenures themselves, for the same military purposes that his father introduced them. He also abolished the curfew; for, though it is mentioned in our laws a full century afterwards, yet it is rather spoken of as a known time of night (so denominated from that abrogated usage), than as a still subsisting custom. There is extant a charter in his name which contains some directions as to crimes and their punishments, and a few things relating to estates, particularly as to the descent of lands. Land descended by the Saxon laws equally to all the sons, by the feudal or Norman to the eldest only, * and king Henry in this particular mod- [* 514] erated the difference between them; directing the eldest son to have only the principal estate, "*primum patris feudum*," the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops and mitred abbots: reserving however these ensigns of patronage, *congé d'élire*, custody of the temporalities when vacant, and homage upon their restitution. He lastly united again for a time the civil and ecclesiastical courts, which union was soon dissolved by his Norman clergy: and, upon that final dissolution, the cognizance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained as in his father's time.

The usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with regard to redressing the grievances of the forest laws, but performed no great matter either in that or in any other point. It is to his reign, however, that we owe the introduction and systematic teaching of the Roman civil and canon laws within this realm; and at the same time was imported into it the doctrine of appeals to the court of Rome, as a branch of the canon law.

By the time of king Henry II., if not earlier, the charter of Henry I. seems to have been in part forgotten: for we find the claim of marriage, ward, and relief, then flourishing in full vigour. The right of primogeniture seems also to have tacitly revived, being found more convenient for the public than the parcelling of estates into a multitude of minute subdivisions. However, in this prince's reign much was done to methodize the laws, and reduce them into a regular order. Throughout this reign also was continued the important struggle, which we have had occasion before to mention, between the laws of England and Rome: the former supported by the strength of the temporal

nobility, the latter by the popish clergy. Which dispute was kept on foot till [* 515] the reign of Edward I.: *when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In connection with the reign of Henry II. four things peculiarly merit the attention of a legal antiquarian: 1. The constitutions of the parliament at Clarendon, A. D. 1164, whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from the secular jurisdiction: though his further progress was unhappily stopped, by the fatal event of the disputes between himself and Archbishop Becket. 2. The institution of the office of justices in eyre, *in itinere*; the king having divided the kingdom into circuits, and commissioned these new created judges to administer justice, and try writs of assize in the several counties. These remedies are said to have been then first invented; before which all causes were usually determined in the county courts, according to the Saxon custom; or before the king's justiciaries in the *aula regis*, in pursuance of the Norman regulations. The latter of these tribunals travelled about with the king's person, and thus were occasioned intolerable expense and delay to suitors; the former, however proper for the hearing of unimportant cases, when even injustice may be sometimes better than procrastination, had become too much open to the charge of ignorance of law, and partiality as to facts, to determine matters of considerable moment. 3. The introduction and establishment of the grand assize, or trial by a special kind of jury in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battle. 4. To this period must also be referred the introduction of escuage, or pecuniary commutation for personal military service; which in process of time was the parent of the subsidies granted to the crown by parliament, and of the land tax of later times.

Richard I., a brave and magnanimous prince, was a sportsman as well as a [* 516] soldier; and therefore enforced *the forest laws with some rigour; which occasioned discontents among his people: though (according to Matthew Paris) he repealed certain corporal penalties before inflicted on such as transgressed in hunting; probably finding that their severity prevented prosecutions. He also, when abroad, composed a body of naval laws at the isle of Oleron: which are still extant, and of high authority: for in his time we began again to discover, that (as an island) we were naturally a maritime power. But, with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the Jews, and the justices in eyre: the king's thoughts being chiefly taken up by the knight errantry of a crusade against the Saracens in the Holy Land.

In king John's time, and that of his son Henry III., the rigours of the feudal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories: which at last had this effect, that first king John, and afterwards his son, consented to the two famous charters of English liberties, *Magna Carta* and *Carta de Foresta*. Of these the latter was well calculated to redress many grievances, and encroachments of the crown, in the exercise of forest law: and the former confirmed many liberties of the church, and redressed many grievances incident to feudal tenures, of no small moment at the time; though now, unless attentively considered, they may seem but of trifling concern. Besides these feudal provis-

ions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable ameracements, from illegal distresses, or other process for debts or services due to the crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. *Magna Carta* fixed the forfeiture of lands for felony; prohibited future grants of exclusive fisheries; and restrained the erection of new bridges so as to oppress the neighbourhood. With respect to private rights: it *established [*517] the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children; and it laid down the law of dower. In matters of public police and national concern: it enjoined an uniformity of weights and measures; gave new encouragements to commerce, by the protection of merchant strangers; and forbade the alienation of lands in mortmain. With regard to the administration of justice: besides prohibiting all denials or delays of it, *Magna Carta* fixed the court of common pleas at Westminster, that the suitors might no longer be harassed with following the king's person in his progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits; it also corrected some abuses then incident to the trials by wager of law and of battle; directed the regular awarding of inquests for life or member; prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer: and regulated the time and place of holding the inferior tribunals of justice, the county court, sheriff's tourn, and court-leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, lastly (which alone would have merited the title that it bears, of the great charter), it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land.

However, by means of these struggles, the pope in the reign of king John gained a still greater ascendant here, than he ever had before enjoyed; which continued through the long reign of his son Henry III.: in the beginning of which the old Saxon trial by ordeal was totally abolished. And we may by this time perceive, from an inspection of *Bracton's treatise, a still further improvement in the method and regularity of the common [*518] law, especially in regard to pleadings. Nor must it be forgotten, that the first traces which remain of the separation of the greater barons from the less, in the constitution of parliaments, are found in the great charter of king John; though omitted in that of Henry III.: and that, towards the end of the latter of these reigns, we find the first record of a writ for summoning knights, citizens, and burgesses to parliament. And here we conclude the second period of our English legal history.

III. The third commences with the reign of Edward I., who has justly been styled our English Justinian. For in his time the law received so sudden a perfection, that sir Matthew Hale does not scruple to affirm, that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom, than had subsequently been effected up to his own time.

It would be endless to enumerate the particulars of these regulations; but the principal may be reduced under the following general heads. 1. He established, confirmed, and settled, the great charter and charter of forests. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction: and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased. 3. He defined the limits of the several temporal courts of the highest jurisdiction, those of the king's bench, common pleas, and exchequer; so as they might not interfere with each other's proper business. 4. He settled the boundaries of the inferior courts in counties, hundreds, and manors: confining them to causes of no great amount, according to their primitive institution. 5. He secured the property of the subject, by abolishing all arbitrary taxes and tallages, levied [* 519] without consent of the national * council. 6. He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere in private causes. 7. He settled the form, solemnities, and effect, of fines levied in the court of common pleas; though the thing itself was of Saxon origin. 8. He first established a repository for the public records of the kingdom; few of which are more ancient than the reign of his father, and those were by him collected. 9. He improved upon the Saxon laws, by the method of watch and ward, for preserving the public peace and preventing robberies, established by the statute of Winchester. 10. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of landed property, by the statute of *quia emptores*. 11. He instituted a speedier way for the recovery of debts, by granting execution, not only upon goods and chattels, but also upon lands, by writ of *elegit*; which was of signal benefit to a trading people: and upon the same commercial ideas, he also allowed the charging of lands in a statute merchant, to pay debts contracted in trade, contrary to all feudal principles. 12. He effectually provided for the recovery of advowsons, as temporal rights; in which, before, the law had been extremely deficient. 13. He also effectually closed the great gulph, in which all the landed property of the kingdom was in danger of being swallowed up by his reiterated statutes of mortmain, most admirably adapted to meet the frauds that had then been devised, though afterwards contrived to be evaded by the invention of uses. 14. He established a new limitation of property by the creation of estates tail. 15. He reduced all Wales to the subjection, not only of the crown, but in great measure of the laws, of England, (which was thoroughly completed in the reign of Henry VIII.;) and seems to have entertained a design of doing the like by Scotland, so as to have formed an entire and complete union of the island of Great Britain.

[* 520] I might continue this catalogue much further—but, * upon the whole, we may conclude that the scheme and model for the administration of justice between party and party, were mainly settled by this king: and continued nearly the same for several centuries; abating some few alterations, which the humour or necessity of subsequent times occasioned. The forms of writs, by which actions were commenced, were made more perfect in his reign. The pleadings, consequent upon the writs, were then short, nervous, and perspicuous; not intricate, verbose, and formal. The legal treatises,

written in his time, as those of Britton, Fleta, Hengham, and others, continued to be, for the most part, of acknowledged authority, till the alteration of tenures took place. And, to conclude, it is from this period, from the date of the exact observance of *Magna Carta*, rather than from that of its making or renewal in the days of king John and Henry III., that the liberty of Englishmen began again to rear its head: though the weight of the military tenures hung heavy upon it for some ages after.

From the time of Edward I. to that of Henry VIII. there happened very few, and those not very considerable, alterations in the legal forms of proceedings. As to matter of substance: the old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and conservators of the peace, were taken from the people in the reigns of Edward II. and Edward III.; and justices of the peace were established instead of the latter. In the reign also of Edward III. the parliament is supposed to have approached its present form, by a separation of the commons from the lords. The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly; and the translation of the law proceedings from French into Latin was another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and * by encouraging clothworkers from other countries to settle [* 521] here. Nor was the legislature inattentive to many other branches of commerce, or indeed* to commerce in general: for, in particular, it enlarged the credit of the merchant, by introducing the statute staple; whereby he might the more readily pledge his lands for the security of his mercantile debts. And, as personal property then grew, by the extension of trade, to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law, to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious. The statutes also of *præmunire*, for effectually depressing the civil power of the pope, were the work of this and of the ensuing reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century: though the seeds of the general reformation, which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution introduced into the laws of the land by the influence of the regular clergy.

From this time to that of Henry VII., the civil wars and disputed titles to the crown gave no leisure for further juridical improvements; "*nam silent leges inter arma.*"—And yet it is to these very disputes that we owe the happy loss of the French dominions of the crown on the continent; an event which turned the minds of our subsequent princes entirely to domestic concerns. To these likewise was due the method of barring entails by the fiction of common recoveries; invented originally by the clergy, to evade the statutes of mortmain, but introduced under Edward IV., for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, their owners endeavoured to protect them by * the universal establishment of uses, [* 522] another of the clerical inventions.

In the reign of king Henry VII., his ministers (not to say the king himself) were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new beneficial regulations. For the distinguishing character of this reign was that of amassing treasure in the king's coffers, by every means that could be devised: and almost every alteration in the laws, however salutary or otherwise in its future consequences, had this and this only for its special and immediate object. To this end the court of star-chamber was new-modelled, and armed with powers, most dangerous and unconstitutional, over the person and property of the subject. Informations were allowed to be received, in lieu of indictments, at the assizes and sessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily and covertly contrived, to facilitate the destruction of entails, and make the owners of real estates more liable to forfeit as well as more capable of alienating them. The benefit of clergy (which so often intervened to stop attainders and save the inheritance) was now allowed but once to lay offenders, who only could have inheritances to lose. A writ of *capias* was permitted in all actions on the case, and the defendant might in consequence be outlawed; because upon such outlawry his goods became the property of the crown. In short, there is hardly a statute in this reign, introductive of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.

IV. This brings us to the fourth period of our legal history, viz., the reformation of religion, under Henry VIII. and his children; which opens up an entirely new scene in ecclesiastical matters; the usurped power of the pope [* 523] being now for ever routed and destroyed, his * connections with this island cut off, the crown restored to its supremacy over spiritual men and causes, and the patronage of bishoprics being once more indisputably vested in the crown. And had the spiritual courts been at this time reunited to the civil, we should have seen the old Saxon constitution with regard to ecclesiastical polity completely restored.

With regard also to our civil polity, the statute of wills, and the statute of uses, (both passed in the reign of this prince,) made a great alteration as to property: the former, by allowing the devise of real estates by will, which before was in general forbidden; the latter, by endeavouring to destroy the intricate nicety of uses, though the narrowness and pedantry of the courts of common law prevented this statute from having its full beneficial effect. And thence the courts of equity assumed a jurisdiction, dictated by common justice and common sense: which, however arbitrarily exercised or productive of jealousies in its infancy, has at length been matured into an admirable system of jurisprudence. From the statute of uses, and another statute of the same antiquity (which protected estates for years from being destroyed by the reversioner), a remarkable alteration took place in the mode of conveyancing: the ancient assurance by feoffment and livery upon the land being very seldom practised, after the more easy and more private invention of transferring property, by secret conveyances to uses; and long terms of years being continually created in mortgages and family settlements, which might be moulded to a thousand useful purposes by the ingenuity of an able artist.

The further attacks in this reign upon the immunity of estates tail, which reduced them to little more than the conditional fees at the common law, before the passing of the statute *de donis*; the establishment of recognizances in the nature of a staple, for facilitating the raising of money upon landed security; and the introduction * of the bankrupt laws, as well for the punishment of the fraudulent, as for the relief of the unfortunate, trader; [* 524] all these were capital alterations of our legal polity, and highly agreeable to that character, which the English began now to reassume, of a great commercial people. The incorporation of Wales with England, and the more uniform administration of justice, by destroying some counties palatine, and abridging the unreasonable privileges of such as remained, added dignity and strength to the monarchy: and, together with the numerous improvements before observed upon, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the administration of Henry VIII. a very distinguished æra in the annals of our juridical history.

It must however be remarked, that (particularly in his later years) the royal prerogative was strained by this sovereign to a very tyrannical and oppressive height; and, what was the worst circumstance, its encroachments were established by law, under the sanction of those pusillanimous parliaments, one of which, to its eternal disgrace, passed a statute, whereby it was enacted that the king's proclamations should have the force of acts of parliament; and others concurred in the creation of that amazing heap of wild and new-fangled treasons, which were slightly touched upon in a former chapter (a). Happily for the nation, this arbitrary reign was succeeded by the minority of an amiable prince; during the short sunshine of which, great part of these extravagant laws were repealed. And, to do justice to the shorter reign of queen Mary, many salutary and popular laws, in civil matters, were made under her administration; perhaps the better to reconcile the people to the bloody measures which she was induced to pursue, for the re-establishment of religious slavery: the well concerted schemes for effecting which, were * (through the providence of God) [* 525] defeated by the seasonable accession of queen Elizabeth.

The religious liberties of the nation being, by that happy event established (though in their infancy guarded, against papists and other non-conformists, by coercive and sanguinary laws); the forest laws having fallen into disuse; and the administration of civil rights in the courts of justice being carried on in a regular course, according to the wise institutions of king Edward I., without any material innovations; all the principal grievances introduced by the Norman conquest seem to have been gradually shaken off, and our Saxon constitution restored, with considerable improvements: except only in the continuation of the military tenures, and a few other points, which still armed the crown with a very oppressive and dangerous prerogative. It is also to be remarked, that the spirit of enriching the clergy and endowing religious houses had (through the former abuse of it) gone over to such a contrary extreme, and the princes of the house of Tudor and their favourites had fallen with such avidity upon the spoils of the church, that a decent and honourable maintenance was wanting to many of the bishops and clergy. This produced the restraining statutes, to prevent the alienations of lands and tithes belonging to the church and universities. The number of indigent persons having

also greatly increased, by withdrawing the alms of the monasteries, a plan was formed in the reign of queen Elizabeth, more humane and beneficial than any which had been previously adopted, for setting to work the able-bodied poor, and affording relief to such as through age or infirmity were unable to work.

Considering, however, the reign of queen Elizabeth in its political aspect, we can have no reason to regret many subsequent alterations in the English constitution. For, though in general she was a wise and excellent princess, and loved her people; though in her time trade flourished, riches increased, [*526] the laws were duly administered, the *nation was respected abroad, and the people were happy at home; yet the increase of the power of the star-chamber, and the erection of the high commission court in matters ecclesiastical, were the work of her reign. She also kept her parliaments at a very awful distance: and in many particulars she, at times, would carry the prerogative as high as her most arbitrary predecessors. It is true, she seldom exerted this prerogative, so as to oppress individuals, but still she had it to exert: and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power to play the tyrant. This is a high encomium on her merit; but at the same time it is sufficient to show, that these were not indeed the golden days of genuine liberty as some have taught: for, surely, the liberty of the subject should be dependent not so much on the gracious behaviour, as on the limited power, of the sovereign.

The great revolution which had happened, in manners and in property, had imperceptibly paved the way, for as great a revolution in government: yet, while that revolution was in progress, the crown became for the time more arbitrary than ever, through those very means which afterwards reduced its influence. Till the close of the Lancastrian civil wars, the property and the power of the nation were chiefly divided between the crown, the nobility, and the clergy. The commons were generally in a state of great ignorance; their personal wealth, before the extension of trade was comparatively small; and the nature of their landed property was such, as kept them in continual dependence; the feudal lord of each such commoner being usually some powerful baron, some opulent abbey, or sometimes the king himself. Though a notion of general liberty had strongly pervaded and animated the whole constitution, yet the particular liberty, the natural equality, and personal independence of individuals, were little regarded or thought of; nay, even to assert [*527] them was treated as the height of sedition and rebellion. Our *ancestors heard, with detestation and horror, those sentiments rudely delivered, and pushed to most absurd extremes, by the violence of a Cade and a Tyler; which have since been applauded, with a zeal almost rising to idolatry, when softened and recommended by the eloquence, the moderation, and the arguments of a Sidney, a Locke, and a Milton.

But when learning, by the invention of printing and the progress of religious reformation, began to be universally disseminated; when trade and navigation were suddenly carried to an amazing extent, by the use of the compass and the consequent discovery of the Indies; the minds of people, thus enlightened by science and enlarged by observation and travel, began to entertain a more just opinion of the dignity and rights of man. An inundation of wealth flowed in upon the merchants, and middle ranks; while the two great estates

of the kingdom, which formerly had balanced the prerogative, the nobility and the clergy, were greatly impoverished and weakened. The popish clergy, detected in their frauds and abuses, exposed to the resentment of the populace, and stripped of their lands and revenues, stood trembling for their very existence. The nobles, enervated by the refinements of luxury (which knowledge, foreign travel, and the progress of the politer arts, are too apt to introduce with themselves), and fired with disdain at being rivalled in magnificence by the opulent citizens, fell into enormous expenses; to gratify which they were permitted, by the policy of the times, to dissipate their overgrown estates, and alienate their ancient patrimonies. This gradually reduced their power and their influence within very moderate bounds: while the king, by the spoil of the monasteries, and the great increase of the customs, grew rich, independent, and haughty; and the commons were not yet sensible of the strength they had acquired, nor urged to examine its extent by new burthens or oppressive taxations, during the sudden opulence of the exchequer. * Intent upon acquiring new riches, and happy in being freed from the insolence and tyranny of the orders more immediately above them, they never dreamt of opposing the prerogative to which they had been so little accustomed; much less of taking the lead in opposition, to which by their weight and their property they were now entitled. The latter years of Henry VIII. were therefore the times of the greatest despotism that have been known in this island since the death of William the Norman: the prerogative as it then stood by common law (and much more when extended by act of parliament), being too large to be endured in a land of liberty.

Queen Elizabeth, and the intermediate princes of the Tudor line, had almost the same legal powers, and sometimes exerted them as roughly, as their father king Henry VIII. But the critical situation of that princess with regard to her legitimacy, her religion, her enmity with Spain, and her jealousy of the queen of Scots, occasioned greater caution in her conduct. She probably, or her able advisers, had penetration enough to discern how the power of the kingdom had gradually shifted its channel, and wisdom enough not to provoke the commons to discover and feel their strength. She therefore threw a veil over the odious part of prerogative; which was never wantonly thrown aside, but only to answer some important purpose: and, though the royal treasury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, she asked for supplies with such moderation, and managed them with so much economy, that the commons were happy in obliging her. Such, in short, were her circumstances, her necessities, her wisdom, and her good disposition, that never did a prince so long and so entirely, for the space of nearly half a century, reign in the affections of the people.

On the accession of king James I., no new degree of royal power was added to, or exercised, by him; but such * a sceptre was too weighty to be wielded by such a hand. The unreasonable and imprudent exertion [* 529] of what was then deemed to be prerogative, upon trivial and unworthy occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, soon awakened the sleeping lion. The people heard with astonishment doctrines preached from the throne and the pulpit, subversive of liberty and property, and all the natural rights of humanity.

They examined into the divinity of this claim, and found it weakly and fallaciously supported: and common reason assured them, that if it were of human origin, no constitution could establish it without power of revocation, no precedent could sanctify, no length of time could confirm it. The leaders felt the pulse of the nation, and found they had ability as well as inclination to resist it: and accordingly resisted and opposed it, whenever the pusillanimous temper of the reigning monarch had courage to put it to the trial; and they gained some little victories in the cases of impositions, monopolies, and the dispensing power. In the mean time, very little was done for the improvement of private justice, except the abolition of sanctuaries, and the extension of the bankrupt laws, the limitation of suits and actions, and the regulating of informations upon penal statutes. For we cannot class the laws against witchcraft and conjuration under the head of improvements; nor did the dispute between lord Ellesmere and sir Edward Coke, concerning the powers of the court of chancery, tend directly to the advancement of justice.

Indeed when Charles I. succeeded to the crown of his father, and attempted to revive some enormities, which had been dormant in the reign of king James, the loans and benevolences extorted from the subject, the arbitrary imprisonments for refusal, the exertion of martial law in time of peace, and other domestic grievances, clouded the morning of that misguided prince's reign; which, though the noon of it began a little to brighten, at last went [* 530] * down in blood, and left the kingdom in confusion. It must be acknowledged that, by the petition of right, enacted to abolish these encroachments, the English constitution received great alteration and improvement. But there still remained the latent power of the forest-laws, which the crown most unseasonably revived. The legal jurisdiction of the star-chamber and of the high commission courts was also extremely great; though their usurped authority was still greater. And if we add to these abuses the disuse of parliaments, the ill-timed zeal and despotic proceedings of the ecclesiastical governors in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ship-money, and other projects, we may see grounds most amply sufficient for seeking redress in a legal constitutional way. This redress, when sought, was also constitutionally given: for all these oppressions were actually abolished by the king in parliament, before the rebellion broke out, by the several statutes for triennial parliaments, for abolishing the star-chamber and high commission courts, for ascertaining the extent of forests and forest laws, for renouncing ship-money and other exactions, and for giving up the prerogative of knighting the king's tenants *in capite* in consequence of their feudal tenures; though it must be acknowledged that these concessions were not made with so good a grace, as to conciliate the confidence of the people. Unfortunately, either by his own mismanagement, or by the arts of his enemies, the king had lost the reputation of sincerity; which is the greatest unhappiness that can befall a prince. Though he formerly had strained his prerogative, not only beyond what the genius of the times would bear, but also beyond the examples of former ages, he had now consented to reduce it to a lower ebb than was thought by many to be consistent with monarchical government. A conduct so opposite to his temper and principles, joined with some rash actions [* 531] and unguarded expressions, made the people suspect that this * condescension was merely feigned. Flushed therefore with the success

they had gained, fired with resentment for past oppressions, and dreading the consequences if the king should regain his power, the popular leaders grew altogether ungovernable, and joining with a set of military enthusiasts, they at length overturned the church and monarchy, and proceeded to the trial and execution of their sovereign.

I pass by the crude and abortive schemes for amending the laws in the times of confusion which followed; the most promising and sensible whereof (such as the establishment of new trials, the abolition of feudal tenures, the act of navigation, and some others) were adopted in the—

V. Fifth period, which I am next to mention, viz., after the restoration of king Charles II., whereupon military tenures (which constituted the then principal remaining grievance) were immediately swept away by statute, except as regarded corruption of inheritable blood, upon attainder for treason or felony. And though the monarch, in whose person the royal government was restored, and with it our ancient constitution, deserves no commendation from posterity, yet in his reign (wicked, sanguinary, and turbulent as it was), the concurrence of happy circumstances was such, that from thence we may date not only the re-establishment of our church and monarchy, but also the regeneration of English liberty. For therein not only the slavish tenures, with all their oppressive appendages, were removed, and ceased to encumber the estates of the subject; but also an additional security of his person from imprisonment was obtained by that great bulwark of our constitution, the *habeas corpus* act. These two statutes, with regard to our property and persons, form a second *magna carta*, as beneficial and effectual as that of Runing-Mead. That only pruned the luxuriances of the feudal system; but the statute of Charles II. for * abolishing military tenures extirpated its worst [* 532] slaveries. *Magna Carta* only, in general terms, declared, that no man shall be imprisoned contrary to law: the *habeas corpus* act points out effectual means, as well for releasing himself, though committed even by the king in council, as for punishing those who may thus unconstitutionally misuse him.

To these benefits derived under Charles II., I may add the abolition of the prerogatives of purveyance and pre-emption; the statute for holding triennial parliaments; the abolition of the writ *de hæretico comburendo*; the statute of frauds and perjuries, which gave a great and necessary security to private property; the statute for distribution of intestates' estates, and that of amendments and *jeofails*, which cut off many superfluous niceties which had long disgraced our law: and what has been here said, when we likewise consider the freedom from excessive taxes and standing armies which the subject then enjoyed, will be sufficient to demonstrate this truth, that the constitution of England had arrived at fuller vigour, and the balance between liberty and prerogative was more true in the reign of king Charles II. than it had ever previously been.

It is far from my intention to palliate or defend many very iniquitous proceedings, contrary to all law, which occurred during that reign, through the artifice of wicked politicians, both in and out of office. What seems incontestible is this; that by the law, as it then stood (*b*) (notwithstanding some invid-

(b) Say, in the year 1679; after the *habeas corpus* act was passed, and that for licensing the press had expired: though the years which immediately followed it were times of great practical oppression.

ious, nay dangerous, branches of the prerogative have since been lopped off, and the residue of it has been more clearly defined), the people had a larger portion of real liberty than they had before enjoyed: and had sufficient power, [* 533] residing in their own * hands, to assert and preserve that liberty, if invaded by the royal prerogative. For which I need but appeal to the memorable catastrophe of the next reign. For when king Charles's deluded brother attempted to enslave the nation, he found it was beyond his power: the people both could, and did, resist him; and, in consequence of such resistance, obliged him to quit his enterprise and his throne together.

Thus far, for the amusement and instruction of the student, have been delineated the outlines of the history of our laws and liberties: from their first rise and gradual progress, among our British and Saxon ancestors, till their total eclipse at the Norman conquest; from which they gradually emerged, and at length rose to the degree of perfection indicated. We have seen, in the course of our inquiries, in this and the former Volumes, in what manner the fundamental maxims and rules of law, which regard the rights of persons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, did, up to the latter part of the seventeenth century, gradually settle down into a system: that the forms of administering justice were much improved under Edward I.: that our religion was established at the reformation; but that the recovery of our civil and political liberties was a work of longer time; a work which greatly advanced after the restoration of king Charles, was more nearly perfected at the era of the happy revolution, and since that epoch has received many and important touches.

And now we pass on to another portion of our legal history; viz.—

VI. From the revolution in 1688 to the passing of the Reform Act, A. D. 1832. This portion of our history may conveniently be subdivided into two parts, the earlier of which reaches to and includes the date of the union with Ireland, an event which consolidated the physical * strength of our [* 534] United Kingdom, and the latter of which closes with an act of political justice; an act not indeed final, but imparting fresh vigour to our constitution.

During the earlier of these two periods many laws of primary importance were promulgated; the bill of rights, the toleration act, the act of settlement, the acts for uniting England with Scotland and with Ireland, and other acts: which, taken together, asserted our liberties in clear and emphatic terms; regulated the succession of the crown by parliament; confirmed and exemplified the doctrine that resistance by the people is justifiable should the executive magistrate endeavour to subvert the constitution; maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal; indulged tender consciences with an increase of religious liberty; established triennial, since turned into septennial, elections of members to serve in parliament; excluded certain officers from the house of commons; efficiently secured the independence and supported the dignity of the speaker of that house; restrained the king's pardon from obstructing parliamentary impeachments; imparted to all the lords an equal right of trying their fellow-peers; regulated and simplified trials for high treason; and declared the functions of the jury in trials for libel; set bounds to the civil list; placed the

administration of that revenue in hands that are accountable to parliament; and made the judges independent of the crown. Though these provisions did, in appearance and nominally, reduce the strength of the executive power to a much lower ebb than in the immediately preceding period; if we throw into the opposite scale the acquisition of force arising from the Riot Act, and the existence sanctioned by parliament of a standing army; if we also take into account the vast increase of persons interested in the maintenance of the *status quo* as creditors of the public, by reason of the enormous additions to our debt, we shall perhaps find * that the crown gradually and imperceptibly gained, in this sixth epoch, almost as much in influence [* 535] as it apparently lost in prerogative.

The chief alterations of moment in the administration of private justice during this period, are the solemn recognition of the law of nations with respect to the rights of ambassadors: the cutting off excrescences, that in process of time had sprung out of the practical part of our law: the protection of corporate rights by the improvements in writs of *mandamus*, and informations in nature of *quo warranto*: the regulation of trial by jury, and the admitting witnesses for prisoners upon oath: further restraints upon alienation of lands in mortmain; the annihilation of the terrible judgments of *peine forte et dure*, and the burning of females: the extension of the benefit of clergy, by abolishing the pedantic criterion of reading: new methods for the speedy recovery of rents: the establishment of paper credit, by recognising and giving validity to indorsements upon bills and notes, and thus facilitating for mercantile purposes the assignment of choses in action: the translation of legal proceedings into the English language: the erection of courts of conscience for recovering small debts, and the reformation of the county courts: and lastly, the establishing of our law merchant upon sound and certain principles: the extending to our courts of law of some equitable doctrines, and the amplifying of the remedies respectively available by actions on promises and on the case.

During the later portion of the period under notice, amongst laws most generally operative and affecting our condition, political religious, and social, may be enumerated the Reform Act, the Roman Catholic Relief Act, the various statutes for relieving non-conformists from disabilities, for repealing enactments which imposed as a qualification for certain offices and employments the sacramental test, and for the further toleration of dissent. During this period also the slave trade was abolished, the * applicability of the remedy [* 536] by *habeas corpus* was extended to civil cases, and the severity of the game laws was mitigated. A more liberal policy during this period was observed in reference to the navigation laws, the poor laws were improved, and encouragement was given by the legislature to friendly societies and savings banks, institutions well adapted for ameliorating the condition of the poorer classes.

During this same period occurred a marked improvement in our criminal law and its administration, the catalogue of crimes capitally punishable was much diminished, the barbarous accompaniments of execution for treason were done away with, the pillory and the whipping of females were discontinued. And to these improvements may be added the suppression of appeals in treason and felony, and of the trial by battle in civil suits, the abolition of corruption of blood, except in cases of treason, murder, or abetting the same. Moreover,

counsel were allowed for the defence in cases of felony; and the body of our criminal law was put together in an amended, methodised, and digested form.

As regards our civil procedure generally, various useful measures were at this time passed, from amongst which may be specified those for rendering more effectual the administration of justice by abolishing the courts of the principality of Wales and the county palatine of Chester, introducing uniformity into the process of our courts, amending and consolidating the law and practice as to juries, preventing arrest on frivolous grounds or for trivial amounts, improving and systematising the laws of insolvency and bankruptcy, and establishing a court of bankruptcy.

Amongst statutory provisions adopted by the legislature at this period affecting private property and dealings between individuals, were included acts which respectively regulate the law as to factors and the relation of landlord and [* 537] tenant, limit the responsibilities of land carriers, and * materially amplify the policy of the statute of frauds and perjuries.

VII. We have now arrived at the seventh and last portion of our legal history, during which the work of improvement has materially progressed, and the activity of our legislature has been excessive. Since the passing of the Reform Act, in June, A. D. 1832, up to the present time, several thousand statutes have been enacted, and of such of them as concern this country (to which alone we can allude), the tendency has in general been still further to carry out the policy of our legislature in the immediately precedent period. It has been developed by statutes to extend greatly the franchise, to purify the consciences and conduct of such as exercise it, and thus to place on a far broader basis than that on which it had before rested, the constitution of the kingdom, which as having safely passed through many and severe ordeals, therefore, is and ever will be an object of interest to mankind.

Much has been done also during the period under notice for improving the social state of the community. The condition of the poor has been ameliorated, the relation of master and servant, of manufacturer and workman, has become—though in this particular much must yet be done—improved; and stricter surveillance has been kept over factories and those employed in them than before. Efforts yet unperfected to bring education and its inestimable benefits within the reach of all are being made; and to the extension of sanitary measures amongst the lower classes attention is being given.

The erection of some new tribunals, especially that which entertains matrimonial and divorce cases, and that which dispenses justice in each locality throughout the country, have thus far had a great, and will, there is reason to believe, hereafter have a yet greater, influence for good. The civil procedure of our superior courts of equity and common law has further been simplified [* 538] and * amended; a way being thus in part cleared for that fusion of law and equity which some desiderate, or for the final establishment of one supreme court of judicature, of which other tribunals shall be but chambers or divisions. Should any such consummation be judiciously effected, conjointly with a revision of our statutes, the jurisprudence of this country, none can doubt, will be exalted, because the law will be more uniformly administered, and justice will not fail on the ground that the judge appealed to for it cannot afford redress.

Next in order an important subject claims attention, the briefest examina-

tion whereof necessitates a retrospect beyond the date at which this period of our epitome commences.

The process which reform in the law of real property has made during the last century is not less remarkable than that which has existed in other branches of our law. During the past fifty years especially, alterations of a most marked and beneficial character have been introduced by the legislature.

The rendering all land subject to the paramount obligation of paying the debts of its owner both before and after his decease, is a provision so obviously consonant to justice, that we now wonder at the tenacity with which our ancestors clung to ideas which had long lost their vital force, and were never very well founded in reason. We marvel that this immunity ever existed, but that it should have continued till within the memory of men yet young appears almost incredible. That the law is not easily rendered perfect, even with such a simple object in view as this, is most true; as we have seen, it has not yet reached a state approaching ideal perfection, but the principles by which the modelling of the law must be regulated, are not well ascertained and admitted. The last innovation effected in the present year by which the distinction between specialty and simple contract creditors is abolished, is especially noticeable for the principle which is *involved in it; viz., of disregarding [*539] all ancient doctrines and prejudices howsoever derived, when they conflict with rules of natural justice, which the freedom of thought, characteristic of the present day, renders obvious to every understanding.

Again we have seen how the relics of mediæval philosophy and a too strict adherence to mere artificial technicalities have been destroyed or rendered innocuous. Contingent remainders, the existence of which must necessarily attend the exercise of that freedom in the disposition of property which modern notions of liberty require, have been released from the artificial restraint and danger which formerly attended them. They are now capable of having their natural effect according to the intention of a settlor; they are themselves made the subject of free disposition. They are only restrained by a salutary limit as to the time during which a man shall be permitted to exercise control over property. We recognise the sound principle that it is not for the benefit of society that any person's whims and caprices shall control the action and right of posterity. A reasonable, and to most minds satisfactory, limit has been therefore imposed or retained, which certainly does not err on the side of giving too little liberty.

The singular caprice of one man has caused a further legal restriction to be added, one which, had not experience shown that such unnatural desires may exist, would hardly have been anticipated to be necessary by any speculator in human nature. It is now unlawful to create a trust for accumulation of income (except for certain specified objects), to endure beyond the period of twenty-one years after the testator's or settlor's death, a period obviously chosen by reference to that of legal infancy.

If the power of alienation has been extended to the great benefit of all concerned, the mode in which that alienation may be effected, has in a still greater degree been improved. Simplicity has been the characteristic of *the changes which have been introduced, but a simplicity suited to [*540] the wants and capabilities of society in its present condition. In ancient times the methods of conveyance were of a simple nature: a man ver-

bally in the presence of his neighbours, who were well acquainted with his own title, made over his land upon which he stood to another, and this public declaration operated as a conveyance. Simplicity of that kind, however, was not such as could continue, as the law did not provide the means of meeting the various desires of landowners, but rather threw every obstacle in their way; by surrounding the subject of tenure with technicalities, it became necessary to use machinery of a highly inconvenient character. Bargains and sales for years and releases, fines and recoveries, held their ground, because, notwithstanding their cumbrousness, they effected what was desired. All these technical difficulties are now swept away, and a simple deed of grant or assignment, varying only according to the essential nature of the transaction, has replaced all former assurances.

The almost solitary technicality as to language still remaining,—that which requires the use, in a deed, of the word “heirs” to create an estate of inheritance,—might with advantage be abolished. It would be simpler and more natural that a grant should convey a fee simple or the whole estate, whatever it may be, of the grantor, unless something else be expressed; and if it be intended to restrict the grant to a life interest, nothing would be easier or would more naturally occur to the grantor than to express such intention by adding the words “for life,” or “in tail,” or any other suitable words expressive of his meaning. This has already been done for wills, and no good reason occurs why the same freedom from technicality should not extend to deeds. The importance is not great, perhaps, as few deeds are likely to be prepared by persons ignorant of the very early rule; but *cui bono* the rule? The substitution of disentailing and acknowledged * deeds for fines and recoveries [* 541] was another revolution of a most beneficial kind, and the present mode of dealing with the interests which formerly required a fine or recovery for their assurance, is almost free from objection. Though even in this case we may ask what good is derived from the inrolment of a disentailing deed. The improvement in the law regulating the validity and construction of wills introduced in the first year of her present Majesty, are amongst changes especially to be commended. Though the special value which they possess can only be fully recognised by those persons who are acquainted with the nature of the difficulties and the character of the ensuing litigation which they were intended to remove. It is not likely that any system of statutory law could obviate the difficulties which always must arise in determining the intention of testators so long as free liberty is given for the exercise of their varied and fanciful devices in dealing with their property, and so long as inattention to accurate language continues, as it ever must continue to exist in uneducated or even in educated minds. It is much that the careful comparison of the innumerable errors and ambiguities which have arisen has enabled lawyers to classify and distinguish them by certain broad rules; the application of these rules to the variations of facts and expressions which must occur, will always be a cause of perplexity and litigation. But to render the formalities, necessary to a good will, alike for all species of property, and of a nature easily understood and complied with, yet satisfactory in their operation, was a valuable contribution to reform.

The law of inheritance, like every other, even of the most fundamental part of our jurisprudence, has been subjected to a careful scrutiny and subsequent

improvement. Accepting the doctrine of primogeniture and priority of males, and assuming that a distinction ought to exist between the devolution of real and personal property, there are but few points now to criticise or *complain of in the rules of descent. These we have noticed in dis- [* 542] cussing the subject. Whether, however, that doctrine and the distinction in question will be allowed much longer to continue as the law of the land, seems to be matter of some doubt. There are many actively working to effect an entire assimilation of the law of real property as regards devolution on intestacy to that of personal property, and a bill to that effect has already been read a second time by the House of Commons. It does not fall within our province to discuss the merits of such an innovation.

Another subject which has occupied a large portion of attention of the legislature, has been that of bankruptcy. Every attempt to place this part of our law upon a footing satisfactory to the community has hitherto failed, notwithstanding that the efforts of our greatest lawyers have been expended in the attempt. It would seem that now a sufficient harvest of experience has been reaped to enable a sound system to be developed; and moderate, if not sanguine, hopes may be entertained as to the success of the measure which this year received the sanction of the legislature.

Amongst the many approaching changes which will be brought about after no distant interval of time, we may note that which will place almost one-half of the community for the first time upon a legal footing in respect of property. The hardship of married women possessing scarcely any rights of property is now being recognised, and will shortly cease to exist, or, at all events, be very greatly alleviated. Another change worthy of remark relates to the powers which are permitted to be exercised by aliens over property. We may shortly expect to see their present disabilities abolished.

Glancing now for a few moments at the changes already made in the jurisdiction of our courts of equity: the simplification of procedure, the enlargement of powers, and tendency to assimilate the action of the court where *deficient in this respect to that of the common law courts, by adopt- [* 543] ing what is useful of the other jurisdiction without losing any of the inherent powers which the court itself possesses—All these, we say, are and must be of great value. That the process of alteration and remodelling is very far from its termination is sufficiently apparent to those who have read the report recently issued by the Judicature Commission. It is, therefore, needless here further to dwell upon this subject.

It will be seen throughout that a strong spirit of utilitarianism has pervaded the legislation of recent times. As far as possible to provide for the difficulties and obviate the dangers which experience has pointed out as occurring in practice, has been a principal object kept in view. Errors and misconceptions are found to repeat themselves: special desires and wants of a similar character occur under most various circumstances. Hence has arisen a system of legislation not directly founded upon the development of philosophical ideas of jurisprudence, but formed rather to meet the requirements of society as constituted at the present day. As instances of this we may note the various acts giving new or enlarged powers to the court of chancery for dealing with the administration of trust and settled estates and property held by several persons in undivided shares, and lord Cranworth's act, which declares that

deeds of certain kinds shall be deemed to contain certain clauses, although no appearance of them is to be found within the language of the parties. Legislation of this kind is of great practical benefit, but it is subject to this remark, that, as it does not depend upon scientific principles of law but rather grows out of the ever-variable habits and customs of men, it will continually call for revision, so as to accord with new wants and new conditions as they arise in society.

Many matters relating to trade besides the law of bankruptcy have, since [* 544] the passing of the Reform Act, * A.D. 1832, engaged the attention of the legislature; of such we can but specify the position of the Bank of England, and regulation of joint stock banks, of railway and other companies. The navigation laws have also been repealed, and the laws as to mercantile shipping have been consolidated; bills of lading and policies of insurance have been made more useful for mercantile purposes; the procedure on bills of exchange has been simplified; and the law of partnership has been amended. The usury laws, long since decried by philosophic jurists, have been abolished, and our postal system has been remodelled.

Lastly, our criminal law has been consolidated and amended, the jurisdiction of justices of the peace to convict summarily has been enlarged, magisterial procedure has been codified, the law as to oaths and evidence has been much improved, and the scale of punishments, the apportioning of punishment to crime, and the methods of punishing delinquents, have been brought more into unison with existing refinement and humanity.

May the great work of legal improvement still continue; may the obstacles which threaten to impede its progress disappear; and may one constant rule of right and justice be applied throughout the land!

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4. The fourth part of the document discusses the ethical considerations surrounding data collection and analysis. It emphasizes the need to protect the privacy and confidentiality of the data being collected. The document outlines best practices for obtaining informed consent from participants and for securely storing and handling the data. It also mentions the importance of being transparent about how the data is being used and the potential for misuse.

5. The fifth part of the document discusses the future of data collection and analysis. It mentions the growing importance of big data and the role of artificial intelligence and machine learning in analyzing complex datasets. The document also discusses the potential for new technologies to improve data collection methods, such as the use of mobile devices and sensors. It concludes by emphasizing the ongoing nature of the field and the need for continued research and innovation.

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